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No. 27

EXTRA JUDICIAL METHODS OF ENFORCEMENT

1. Liquidated Damage Provisions in Voluntary and Compulsory Industry Agreements.

2. Imposition of Conditions Upon the Letting of Government Contracts.

3. Government Sanctioned "Boycotts" and Other Publicity Devices.

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Legal Enforcement Studies Section

January, 1936

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C O N F I D E N T I A L

MEMORANDUM TO: SECTION HEADS January 8, 1936.

SUBJECT: WORK MATERIALS NO. 27

EXTRA JUDICIAL METHODS OF ENFORCEMENT

This preliminary draft of Extra Judicial Methods of Enforcement has been prepared under the general supervision of Robert S. Denvir by the persons indicated below:

1. The use of Liquidated Damage Provisions in Voluntary and Compulsory Industry Agreements, by Mr. Mortimer Weinbach.

2. The Imposition of Conditions Upon the Letting of Government Contracts, by Mr. George W. Lindsay.

3. Government Sanctioned "Boycotts" and other Publicity Devices (Labels, Insignia and other Forms), by Mortimer Weinbach.

This is a preliminary draft -- an exploration of the field as a basis for further work. Not all material in it has as yet been verified and checked, nor does it present a fully rounded treatment of the subject. It is made available for confidential use within the Division of Review because of its usefulness in connection with various studies.

L. C. Marshall
Director, Division of Review

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THE USE OF LIQUIDATED DAMAGE PROVISIONS IN VOLUNTARY AND COMPULSORY INDUSTRY AGREEMENTS

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THE USE OF LIQUIDATED DAMAGE PROVISIONS

IN INDUSTRY AGREEMENTS

Conclusions

1) An agreement, made in advance of a breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

2) In weighing the practices with respect to liquidated damages as employed in codes under the National Industrial Recovery Act against the principles enumerated, it is difficult to avoid concluding: in relation to code violations (a) that the amounts agreed upon and the administration of the same were literally penalties to enforce compliance; and (b), that under the doctrine that where a new duty is imposed by statute, if a remedy be given by the same statute for its non-performance, the remedy given is exclusive, no legal sanction for such a remedy, as the provisions generally employed in the codes, was permissable under the statute.

3) Liquidated damages as a means of "self-enforcement" in voluntary agreements can be introduced effectively by adequate provision in a statute pursuant to which authority exists for the making of such agreements.

4) That such power exists in Congress is shown in many statutes and decisions thereon.

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I. OUTLINE

This study necessarily assumes the power in Congress to pass a valid law enabling industry members to agree voluntarily to observe specified labor conditions and competitive practices. The subject of the inquiry relates to the inclusion in such agreements of liquidated damage provisions as a method by which, and the extent to which such method is available, as an enforcement device in connection with breaches or other infractions of such agreements.

Where used in private agreements the chief advantage of this device has likewise been its most serious legal handicap: a liquidated amount as damages has the deterrent effect of a fixed "penalty," but if a penalty it is not legally enforceable. Hence, at the outset, it is necessary to define and distinguish liquidated damages and penalties, and as an aid in an understanding of its development as a doctrine to consider the canons of interpretation which have been employed by the courts and text writers.

The position of the State Courts in this connection is fairly represented in Section 339 of the Contracts Restatment (Am. L. Inst. 1930), the significant portion thereof reading:

> "An agreement, made in advance of a breach, fixing the damages therefore, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless
>
> "(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and
>
> "(b) the harm that is caused by the breach is one that is capable or very difficult of accurate estimation."

In the Federal Courts the earlier decisions followed the English Courts and took the position that the sum stipulated as liquidated damages would be held to be a penalty if unreasonable or unjust or disproportionate to the actual damages, and, if the intent was doubtful, favored the interpretation which made the sum a penalty. However, beginning with Sun Printing, Etc. v. Moore, 183 U. S., the Supreme Court taking a more liberal attitude stressed its willingness to give effect to the intention of the parties by a proper construction of their agreement. The Kothe Case, however, in 280 U.S. renewing the emphasis on a proper proportion to the damages reasonably to be anticipated.

In weighing the practices with respect to liquidated damages as employed in codes under the National Industrial Recovery Act against the principles enumerated, it is difficult to avoid concluding: (a) that the amounts agreed upon and the administration of the same were literally penalties to enforce compliance and (b), that under the doctrine that where a new duty is imposed by statute, if a remedy be given by the same statute for its nonperformance, the remedy given is exclusive, no legal sanction for such a remedy in relation to code violations was permissable under the statute.

Finding little analogy in the decisions supporting the power of assessments to maintain their purposes by fines or penalties the need for at least an enabling statute providing for such a means of enforcement is recognized in the

damage suits under the Anti-trust Laws and particularly with relation to the experiences of the Cooperative Marketing Associations. It is shown that the Standard Cooperative Marketing Act enables the by-laws of the Association or the marketing agreement to fix the liquidated damages, and the availability and the suitability of this remedy is indicated by the special position occupied by the Association in such agreements. It being difficult to discern any analogy in the agency administering the contemplated industry agreements (such agency not being damaged in the same sense), a statute making similar provision for the use of this remedy for breaches of such agreements would subject the proponents thereof to the task of adjusting any stipulated sums to a reasonable estimate of any damages in the light of the substantive principles enumerated.

It is thus indicated that the enabling statute must itself contain the specific prescription for the same in terms of fixed damages; that such power exists in Congress is shown in many statutes and decisions thereon.

It is, therefore, concluded that liquidated damages as a means of "self-enforcement" in such agreements can effectively be introduced only by its adequate inclusion in the statute pursuant to which authority exists for the making of such agreements in the first instance.

II. THE USE OF LIQUIDATED DAMAGE PROVISIONS IN INDUSTRY AGREEMENTS

For the purposes of the conclusions reached herein, it will be necessary to assume, (a) the participation of the Government in or Governmental sanction of agreements by industry members to observe specified labor conditions and competitive practices, (b) that such agreements are otherwise valid, and (c), that there is party to such agreements in addition to the members of the industries, some agency, Governmental or otherwise, which carries the burden and responsibility of execution and administration. This study relates to the availability of liquidated damage provisions in such agreements as a means of self-enforcement.

In private agreements, the utilization and the inclusion of a provision for liquidated damages in the event of a breach thereof, have been of long standing and its development from the common law has turned upon its nature as a legal instrumentality predetermining the damages naturally flowing from an anticipated breach of such private agreements. The primary concern of the courts in construing clauses of that type and the effects thereof in private agreements, has been the determination of whether by language and by effect the same are valid as agreements to liquidate damages, or whether the same are "penalties," and hence, legally unenforceable. At the outset, therefore, it would seem to be in order to inquire into and define the terms "liquidated damages" and "penalties," (the latter term to be distinguished, however, from penalties imposed by statute as punishment for certain infractions of law).

LIQUIDATED DAMAGES AND PENALTIES DEFINED AND DISTINGUISHED

These terms have had a varied treatment in the hands of authoritative text writers, (definitions and a general discussion of this subject are to be found in 2 Williston, Contracts (1920) Secs. 769-792; 1 Sedgwick, Damages (9th ed. 1912) Secs. 389-427), from which the following would seem to be well settled. "Liquidated Damages" are a sum which a party to a contract agrees to pay, or a deposit which he agrees to forfeit if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage, would probably ensue from the breach, is legally recoverable and retainable as agreed damages if the breach occurs. A "penalty" is a sum which a party similarly agrees to pay or forfeit in the event of a breach, but which is forfeited, not as an estimate of probable actual damages, but as a punishment, the treatment of which is designed to prevent the breach, or as security, to insure that the person injured shall collect his actual damages. And again, where the parties to an agreement stipulate in advance that, if a breach occurs, the one who committed the breach shall pay to the other a fixed sum of money, the amount so agreed upon is called liquidated damages if it is the intention of the parties that it shall represent the loss sustained and it does actually approximately represent such loss. If the intention of the parties is that the sum so fixed shall be paid, not in lieu of performance but to secure performance, the sum is called a penalty. The test of whether a sum named is liquidated damages or a penalty, is whether the parties agreed upon the same as the reasonable equivalent of prospective injury from a possible breach, or whether they acted to secure performance by a provision for excessive payment under fault.

The importance of distinguishing and construing these provisions in the light of their respective categories is vital to the well-established doctrine that the courts will respect a provision for the payment of liquidated damages whereas they will ordinarily relieve against the provision for the payment of a penalty. If the court decides that the sum agreed upon is a bona fide agreement to liquidate the damages, the defendant, in case of breach, must pay to the plaintiff the liquidated amount whether the actual damages turn out to be more or less than such sum. On the other hand, if the court decides that the sum agreed upon in advance is a penalty, the stipulation of the parties will not be enforced and the plaintiff will be forced to prove the actual damages the same as though no agreement with reference to the damages had been made. (See Brightman, Liquidated Damages, (1925), 25 Col. L. Rev. 277; McCormick, Liquidated Damages, (1930) 17 Vir. L. Rev. 103; 39 Harv. L. Rev. (Note) 391.)

III. THE CANONS OF INTERPRETATION

In deciding whether a stipulated sum is liquidated damages or a penalty most courts have employed certain important rules or canons of interpretation which should be considered as an aid in the development of the doctrine. In Keeble v. Keeble, 85 Ala. 552, Somerville, J., suggested certain rules as follows:

> "'The following general rules may be deduced from the authorities, each having more or less weight, according to the peculiar circumstances of each case, and the nature of the contract sought to be construed: (1) The court will always seek to ascertain the true and real intentions of the contracting parties, giving weight to the language or words used in the contract, but not always being absolutely controlled by them, when the enforcement of such contract operates with unconscionable hardship, or otherwise works an injustice. (2) The mere denomination of the sum to be paid as 'liquidated damages,' or as a 'penalty,' is not conclusive on the court as to its real character. Although designated as 'liquidated damages' it may be construed as a penalty, and often when called a 'penalty' it may be held to be liquidated damages, where the intention to the contrary is plain. (3) The courts are disposed to lean against any interpretation of a contract which will make it liquidated damages; and, in all cases of doubtful intention, will pronounce the stipulated sum a penalty. (4) Where the payment of a smaller sum is secured by an obligation to pay a larger sum, it will be held a penalty, and not liquidated damages. (5) Where the agreement is for the performance or nonperformance of a single act, or of several acts, or of several things which are but minor parts of a single complex act, and the precise damage resulting from the violation of each covenant is wholly uncertain or incapable of being ascertained save by conjecture, the parties may agree on a fixed sum as liquidated damages, and the courts will so construe it, unless it is clear on other grounds that a penalty was really intended. (6) When the contract provides for the performance of several acts of different degrees of importance, and the damages resulting from the violation of some, although not all, of the provisions are of easy ascertainment, and one large gross sum is stipulated to be paid for the breach of any, it will be construed a penalty, and not as liquidated damages. (7) When the agreement provides for the performance of one or more acts, and the stipulation is to pay the same gross sum for a partial as for a total or complete breach of performance, the sum will be construed to be a penalty. (8) Whether the sum agreed to be paid is out of proportion to the actual damages, which will probably be sustained by a breach, is a fact into which the court will not enter on inquiry, if the intent is otherwise made clear that liquidated damages, and not a penalty, is in contemplation. (9) Where the agreement is in the alternative, to do one of two acts, but is to pay a larger sum of money in the one event than in the other, the obliger having his election to do either, the amount thus agreed to be paid will be held liquidated damages, and not a penalty. (10) In applying these rules, the controlling purpose of which is to ascertain the real intention of the parties, the court will consider the nature of the

contract, the terms of the whole instrument, the consequences naturally resulting from a breach of its stipulations, and the peculiar circumstances surrounding the transaction; thus permitting each case to stand, as far as possible on its own merits and peculiarities."

These rules may be compared with the summary by Lord Dunedin as set forth in Dunlop Pneumatic Tyre Co., Ltd. v. New Garage & Motor Co., Ltd., (1915) A.C 89,86. As enumerated by Sedgwick in his work on Damages, Vol. I, pp. 785-809 they included:

"(1) Where the stipulated sum is wholly collateral to the object of the contract, being evidently inserted merely as security for performance, it will not be allowed as liquidated damages.

"(2) Whenever an amount stipulated is to be paid on the nonpayment of a less amount or on default in delivering a thing of less value, the sum will generally be treated as a penalty.

"(3) Whenever the stipulated sum is obviously greater than the damage could be, it will not be allowed as liquidated damages.

"(4) Whenever the stipulated sum is to be paid on a breach of a contract of such a nature that the loss may be much greater or much less than the sum, it will not be allowed as liquidated damages.

"(5) A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty.

"(6) Where the instrument refers to a sum deposited as security for performance, or paid in advance to be forfeited on default, the forfeiture, if reasonable in amount, will be enforced as liquidated damages.

"(7) If the contract is one in which the measure of damages for part performance is ascertainable and a sum is stipulated for entire breach of it, this sum will not be allowed as liquidated damages in case of a partial breach.

"(8) Where, independently of the stipulation, the damages would be wholly uncertain, and incapable or very difficult of being ascertained, except by mere conjecture, there the damages will be usually considered liquidated.

"(9) Upon breach of a contract for the sale of property of uncertain value the stipulated sum is allowed as liquidated damages.

"(10) Where a party binds himself in a sum named not to carry on any particular trade, business, or profession, within certain limits, or within a specified period of time, the sum mentioned will be regarded as liquidated damages and not a penalty.

"(11) Parties may usually liquidate damages for delay in performance of a contract.

"(12) If the sum be evidently fixed to evade the usury laws or any other statutory provisions, the courts will relieve by treating it as a penalty."

In Williston on Contracts (1920) sec. 783, the author sets forth rules aiding the court in determining whether a sum is liquidated damages, as follows:

"Whether the essential question to be determined is (1) the reasonableness of a sum named as liquidated damages or (2) the fact that the parties attempted to value in good faith, when the contract was made, the actual injury which would be caused by a breach, there cannot well be any other liquidated damages for a breach which causes an injury, the extent of which is mathematically certain, than the very sum thus mathematically determined; and if the amount of the injury, though not mathematically certain, can readily be valued, and a valuation must, as matter of obvious fact, fall within narrow limits, not only is a sum much beyond those limits unreasonable, but the parties must be regarded as chargeable with notice of that fact. Moreover, there is small reason to suppose that the parties will attempt in good faith to value the injury beforehand, if it can perfectly well be valued afterwards; so that not only are the parties more likely to make a bona fide attempt to liquidate their damages if from the nature of the contract the breach will cause damage uncertain in amount and not readily calculable, but the courts also are more ready to regard a provision as reasonable where ordinary principles of compensation cannot easily be applied, and will not afford certain relief. The amount of the sum named, however, even in such a case, has also an important bearing upon the question. Though the mere fact that, as it turns out, the sum named exceeds the actual damage, will not make it a penalty, since the reasonableness of the provision must be considered as of the date of the contract, yet the excessive size of the sum agreed upon may tend to show that the parties did not make a bona fide effort to fix the actual value of the injury. Even more clearly, where a contract contains a number of promises or a continuing obligation, a provision that a fixed sum shall be paid for any breach of any promise, or for any delay in performing the continuing obligation is a penalty. The provision is in fact unreasonable, and, furthermore, it is impossible to show in such a case that the parties made an honest attempt to estimate the actual injury which would be caused, since no reasonable person would suppose that the injury from any breach which might occur would involve the same damage as any other breach, * * * Whether a provision is penal or only a liquidation of damages is a question of law."

IV. STATE JURISDICTION

The State courts have generally respected a provision for the payment of liquidated damages and have ordinarily relieved against a provision for the payment of a penalty. In view of the representative character of the annotations already completed concerning the principles set forth in the Contracts Restatement (Am. L. Inst. 1930) on this subject, (these include the States of California, Connecticut, Florida, Illinois, Indiana, Massachusetts, Missouri, Mississippi, Nebraska, New York, Ohio, Rhode Island, Texas, and Wisconsin) it would seem to be a fair assertion that the position of the State courts in this matter is as set forth in Section 339 of the Restatement, subject to any qualifications described in the annotations following.

This section reads as follows:

"Sec. 339. LIQUIDATED DAMAGES AND PENALTIES. (1) An agreement, made in advance of a breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless

"(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

"(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

"(2) An undertaking in a penal bond to pay a sum of money as a penalty for nonperformance of the condition of the bond is enforceable to the extent of the harm proved to have been suffered by reason or such nonperformance, and in no case for more than the amount named as a penalty, with interest."

A - California Annotations

"Subsection (1). California is in full accord with this section. Cal. Civ. Code, Sec. 1670: "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." Sec. 1671: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

The use of the words "liquidated damages" in the contract is not controlling. Mente & Co. v. Fresno C. & W. Co., 133 Cal. App. 325; Kelly v. McDonald, 98 Cal. App. 121; Wright v. Rodgers, 198 Cal. App. 137. The use of "penalty" will not prevent construing provisions as a valid one for liquidated damages. Dyer Bros. Iron Wks. v. Central Iron Wks., 182 Cal. 588.

A stipulation in the contract that actual damages for its breach would be impracticable and extremely difficult to fix, does not control, expecially where the facts indicate otherwise. Harlan Dry Dock Co. v. McNear, 70 Cal. App. 204; Stark v. Shemada, 187 Cal. 785; See Also Consol. Lumber Co. v. City of Los Angeles, 33 Cal. App. 698.

In certain type of cases the courts have held that, because of their nature, the provision for liquidated damages will be construed as such and held valid. Contracts for cooperative marketing fall within this group, the provisions being held valid. Milk Producers Ass'n. v. Webb, 97 Cap. App. 651; Calif. Bean Brewers Ass'n. v. Sanders, 86 Ca. App. 689; Same v. Rindge Co., 199 Cal. 168; Poultry Producers v. Murphy, 64 Cal. App. 450; Ansheim Citrus Fruit Ass'n. v. Yeomen, 51 Cal. App. 759.

Where the contract providing for liquidated damages is such that damages for its breach are easily ascertainable the provision will be construed as a penalty. Robert Marsh & Co. v. Tremper, 210 Cal. 572.

If it appears from the contract that the intent was to impose a penalty merely, the provision will be so construed. Nakagawa v. Okanato, 164 Cal. 718.

Subsection (2). In accord. Weinreich Estate Co. v. Johnston Co., 28 Cal. App. 144.

B - Connecticut Annotations

This section is in harmony with the Connecticut decisions.

As a general rule parties are allowed to make such contracts as they please, including contracts to liquidate and fix beforehand the amount to be paid as damages for a breach of such contract; but the courts have always exercised a certain power of control over contracts to liquidate damages, so as to keep them in harmony with the fundamental general rule that compensation shall be commensurate with the extent of the injury. * * * In determining whether a sum agreed to be paid on breach of contract is a penalty or liquidated damages, the court will look at the entire agreement, its scope, purpose and subject matter and may consider the result of a breach thereof, and the reasonableness of the sum agreed to be paid therefor, under all circumstances of the case. * * * When the nature of the agreement is such that upon a breach of it the amount of damages would be uncertain or difficult of proof, and the parties have beforehand expressly agreed upon the amount of damages and that amount is not greatly disproportionate to the presumable loss, their expressed intent will be carried out. (New Britain v. New Britain Tel. Co., 76 Conn. 326, 332, 333.

Associated Hat Mfrs. v. Baird-Unteidt Co., 88 Conn. 332; Schoolnick v. Gold, 89 Conn. 110; Politziner v. Vanech, 101 Conn. 265; Miller v. Macfarlane, 97 Conn. 299; Bridgeport v. U. S. F. & G. Co., 105 Conn. 11.

Subsection (2). It was long ago settled that the penalty of a bond is not recoverable as a debt or as a penalty but only as damages for the breach of the condition of the bond. Miller v. Macfarlane; Fowler v. Mallory; 53 Conn. 420.

C - Florida Annotations

The law of Florida generally supports the statements of this section. It is well settled that the parties may contract to pay liquidated damages for a breach of the contract. Taylor v. Rawlins, 90 Fla. 621. Whether a

stipulation is for a penalty or for liquidated damages is a question of law and not for the jury. Greenblatt v. McCall & Co., 67 Fla. 165; Chace V. Johnson, 98 Fla. 118; Chace v. Smith, 102 Fla. 1013.

The mere denomination of the sum to be paid as liquidated damages is not conclusive as to its real character and legal effect. Greenblatt v. McCally & Co., 67 Fla. 165. Where an amount agreed on is liquidated damages, it may be so unreasonable as to show an intention to provide for a penalty. Southern Menhaden Co. v. How, 71 Fla. 128.

Smith v. Newell, 37 Fla. 147, holding forfeiture of $500 a penalty where its payment was conditional on the breach of stipulations of indifferent importance; Lee v. Clearwater Growers'Ass'n. 93 Fla. 214, amount not shown to be unjust, oppressive, or disproportionate to actual damages.

A contract for liquidated damages will be upheld, if reasonable and not providing for a penalty. Atlantic & Gulf Fertilizer Co. v. Mayo-Lyles, 97 Fla. 1.

A stipulation in a lease that the lessor's reentry for conditions broken shall not work a forfeiture of rent is not invalid as penalty. Casino Amusement Co. v. Ocean Beach Amusement Co., 101 Fla. 59.

D - Illinois Annotations

Subsection (1). And even where the parties stipulate for the payment of a sum certain on default of performance of an agreement, such stipulation will be treated as a penalty, if the damages are not difficult of ascertainment. (Tiernan v. Hinman (1855) 16 Ill. 400, 403.

There is said to be a "well established rule, that where there are several covenants or stipulations in an agreement, the damages for the nonperformance of some of which are readily ascertainable by a jury, and the damages for the nonperformance of the others are not measurable by any exact pecuniary standard, and a sum is named as damages for a breach of any of the covenants or stipulations, such sum is held to be merely a penalty." Trower v. Elder (1875) 77 Ill. 452, 455, cited in East Moline Co. v. Weir Plow Co. (1899 C.C.A.) 95 Fed. 250, 255, and Iroquois Furnace Co. v. Wilkin Mfg. Co. (1899) 181 Ill. 582, 603, 54 N.E. 987, 994; and See Bryton v. Marston (1899) 33 Ill. App. 211,215-216.

For statements that if the amount agreed to be paid is out of proportion to the probable damage, the court is disposed to regard the provision as one for a penalty; Doane v. Chicago City Ry. Co. (1893) 51 Ill. App. 353,367 affirmed (1896) 160 Ill. 22, 43 N.E. 507; Elgin, Joliet & Eastern Ry. Co. v. N.W. National Bank (1911) 165 Ill. App. 35,39.

Holding that the amounts fixed by agreements were reasonable forecasts B. & R. Brewing Co. v. Modzelewski (1915) 269 Ill. 539, 109 N. E. 1058 (provision for $50 liquidated damages for each month in which saloon keeper failed to comply with contract to buy all beer from plaintiff brewery); and see Standard Brewery v. Schmalhausen (1912) 175 Ill. App. 629.

Note Christain Mills, Inc. v. Berthold Stern Flour Co. (1927) 247 Ill. App. 1. A contract for the sale of flour to be manufactured and shipped on the buyer's direction provided that the seller should recover as liquidated damages the total from a formula amounting to (a) approximately 10 cents per bushel of flour resulting from the loss upon the wheat to be made into the flour; (b) approximately 38 cents per bushel of flour covering interest on the cost of the wheat insurance and storage for a period of four months between the dates of the contract and breach; and (c) the amount of the decline between the highest closing price per bushel of wheat on the date of the contract and the date of the breach, a corresponding credit to be given the buyer if the price had advanced. The provision was held fair and reasonable. But cf. Marshall Milling Co. v. Rosenbluth (1924) 231 Ill. App. 325.

Holding agreement unenforceable because amounts fixed were not reasonable forecasts of just compensation: Scofield v. Tompkins (1880) 95 Ill. 190 (provision allowing vendor of land to recover as "liquidated damages" for vendee's breach amount equal to sale price); Van Kannel v. Higley (1912) 172 Ill. App. 88 (provision to "forfeit and Pay" $600 as "liquidated damages" for failure to complete a $5500 house by a certain date); White v. Mandel Bros. (1928) 248 Ill. App. 313 (loss of commissions by employee' Citing Scofield v. Tompkins, supra; North & South Rolling Stock Co. v. O'Hara (1898) 73 Ill. App. 691, 710.

In accord with the Restatement in holding that only actual damages may be recovered; Westfall v. Albert (1904) 212 Ill. 68, 72 N.E. 4 (bond given to dissolve an injunction); Giesecke v. Cullerton (1917) 280 Ill. 510, 117 N.E. 77 (bond by a lessee conditioned upon his faithful performance of promise to spend $5000 for improvement within six months). Citing Westfall v. Albert, supra; People v. Mitchell (1921) 223 Ill. App. 8,21.

As to penalbonds running to the United States note the following: "In all suits brought to recover the forfeiture annexed to any ... bond... where the forfeiture, breach or nonperformance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury." U.S. Rev. Stats., sec. 961 (U.S. Code, Title 28, sec. 785) and see Chicago House-Wrecking Co. v. United States (1901 C.C.A.) 106 Fed. 385.

E.- Indiana Annotations

The American Lab Institute provides for the recovery of liquidated damages.

Clause (a). Where the amount so fixed is a reasonable forecase of just compensation. In accord. Merica v. Burget (1905) 56 Ind. App. 453; J.I. Case Threshing Mach. Co. v. Souders (1911) 48 Ind. App. 503. This rule is generally worded so as to read that liquidated damages are recoverable though the amount of the damages for breach is easily established if the stipulated amount does not differ greatly from what would be recovered under the judicial measure of damages. Willis on Damages, 73.

Clause (b). Where the injury caused by breach is incapable or very difficult of accurate estimation. In accord. Hamilton v. Overton, (1842) 6 Blackf. 206; Duffy v. Schockey (1858) 11 Ind. 70,71; Studebaker v. White (1869) 31 Ind. 211; McCormick v. Mitchell (1877) 57 Ind. 248; Johnson v. Gwinn (1884) 100 Ind. 466; Martin v. Murphy (1891) 129 Ind. 464; Mondamin Meadows Dairy Co. v. Brudi (1904) 163 Ind. 642; Benner v. Mages (1904) 34 Ind. App. 176; George B. Swift Co. v. Dolle, Receiver (1907) 39 Ind. App. 653; Barber Asphalt Paving Co. v. City of Wabash (1909) 43 Ind. App. 167; Burley Tobacco Society v. Gillaspy (1912) 51 Ind. App. 583; Miller v. Fletcher Savings & Trust Co. (1922) 78 Ind. App. 183.

Compare with liquidated damages a direct obligation of a contract. Beck et al v. Indianapolis Light & Power Co. (1905) 56 Ind. App. 600.

Where a contract contains several provisions of different importance, the damages for the breach of some of which would be certain and of others uncertain, and a large sum is expressed in the agreement as payable on any of the stipulations, such sum is regarded as a penalty rather than liquidated damages. Carpenter v. Lockhart (1849) 1 Ind. 434; Jeffries v. Lesh (1924) 195 Ind. 305; Calvert v. Price (1924) 82 Ind. App. 250.

So also where there is a contract to purchase and the purchase price is payable in instalments, if there is a stipulation that, in case of default of the vendee in the payment of either a part or whole of the purchase price, liquidated damages shall be the full amount of the purchase price, such stipulation is a penalty and not liquidated damages. Zenor v. Pryor (1914) 57 Ind. App. 222.

In case of doubt, a stipulation should be construed a penalty. Eikenberry v. Thorn (1916) 61 Ind. App. 468.

Subsection (2). The penalty of a penal bond is enforceable only to the extent that it fixes a minimum. Broun v. Maulsby (1861) 17 Ind. 10 (semble).

F - Massachusetts Annotations

The results of the Massachusetts decisions are in substantial harmony with this section, although the form in which the results are stated differs materially therefrom.

(1) A bargain for a penalty is unenforceable. Perkins v. Lyman, 11 Mass. 76; Merrill v. Merrill, 15 Mass. 488; Stearns v. Barrett, 18 Mass. (1 Pick.) 443; Brown v. Bellows, 21 Mass. (4 Pick.) 189; Kellogg V. Curtis, 26 Mass. (9 Pick.) 534; Fisher v. Barett, 58 Mass. (4 Cush.) 381; Mayer v. Estes, 164 Mass. 457; Briggs v. De Peiffer, 214 Mass. 52.

(2) A bargain fixing liquidated damages is enforceable. Leary v. Laflin, 101 Mass. 334; Hall v. Crowley, 87 Mass. (5 Allen) 304; Garst v. Harris, 177 Mass. 72; Norcross Bros. v. Vose, 199 Mass. 81; Morrison v. Richardson, 194 Mass. 370; Putnam Machine Co. v. Mustakangos, 236 Mass. 376; Ind. Paper Co. v. Priscilla Co. 281 Mass. 22.

The problem under the Massachusetts law is thus resolved to the determination whether a given provision is for a penalty or for liquidated damages. The controlling factor in the determination is the intent of the parties (Cushing v. Dreer, 97 Mass. 445) Lynde v. Thompson, 84 Mass. (2 Allen) 456; Leary v. Laflin, 101 Mass. 334; Rowes v. Upton, 125 Mass. 258; Kaplan v. Gray, 215 Mass. 269; Putnam Machine Co. V. Mustakangos. 237 Mass. 376.

The "real intent of the parties" for which the court searches appears to be their intent either to make a reasonable forecase of just compensation or to provide a punishment in terrorem for a breach.

The language used by the parties is not controlling on the question of intent. Pierce v. Fuller, 8 Mass. 223; Shute v. Taylor, 46 Mass. (5 Met.) 61. However, in the case of Guerin v. Stacy, 175 Mass. 595 C. J., Holmes said: "The proper course is to enforce contracts according to their plain meaning and not to undertake to be wiser than the parties and therefore that in general when parties say that a sum is payable as liquidated damages they will be taken to mean what they say and will be held to their words," making an exception in a case where the payment "secures several promises of varying importance, one or more of which is for the payment of a much smaller sum of money." See also Garst v. Harris, 177 Mass. 72; Kaplan v. Gray, 215 Mass. 269; Bedard v. C. S. Ransom Inc., 241 Mass. 74 where the transaction is such that damages are difficult to estimate accurately, the parties are "deemed to have intended that the sum agreed on shall be treated as liquidated damages." Chase v. Allen, 79 Mass. (13 Gray) 42; Lynde v. Thompson, 84 Mass. (2 Allen) 456; Atlantic Refining Co. v. Barnard, 264 Mass. 560.

Where a bond is given for the satisfactory performance of a contract, with a sum named to be paid in the event of nonperformance of the bond's condition, the rule is the same as that already expressed, and if the sum named is intended as liquidated damages, it is recoverable as such. Hodges v. King, 48 Mass. (7 Met.) 583; Guerin v. Stacy, 175 Mass. 595. But where the bond provides for a penalty it is not enforceable. Shute v. Taylor, 46 Mass. (5 Met.) 61; Fish v. Gray, 95 Mass. (11 Allen) 132; Henry v. Davis, 123 Mass. 345.

G - Missouri Annotations

Missouri law substantially in accord with the ideas of this section.

Subsection (1). In Buchanan v. Louisana Purchase Exposition Co. (1912) 245 Mo. 337, the court states that, in distinguishing between liquidated damages and penalties, the question is "whether the damages following a breach of the agreement are such as can be definitely or readily ascertained by evidence or fixed rules of computation; or, on the other hand, whether the damages are such that it would be difficult, if not impossible, to measure them by any exact pecuniary statute or calculate them with approximate accuracy. In the first instance, if the amount stipulated is grossly disproportionate to the loss following a breach of contract, the court will construe it to be a penalty. * * * In the second instance, if the amount specified appears to be a reasonable estimate of undefinable and unascertainable damages, the court will construe it as a proper liquidation." In accord are: May v. Crawford (1899) 150 Mo. 504; Cochran v. Peoples Ry Co. (1892) 113 Mo. 359; Morse v. Rathburn (1868) 42 Mo. 594.

See also Yerxa v. Randazzo Macaroni Co. (1926) 315 Mo. 927; Adams v. Luckaman (Mo. App. 1923) 256 S.W. 103; Thompson v. St. Charles County (1910) 227 Mo. 220; Tinkham v. Satori (1891) 44 Mo. App. 659.

Adams v. Luckaman (Mo. App. 1923) 256 S.W. 103, decides that "where there are several covenants in a contract of varying degress of importance and a sum is stipulated therein which is to be paid on the breach of either or any of such stipulations, the courts are inclined to treat the same as a penalty." In accord, see Knaus v. Lindsey (1926) 222 Mo. App. 476.

The fact that damages stipulated are called either a penalty or liquidated damages is not conclusive. Yerxa v. Randazzo Macaroni Co. (1926) 315 Mo. 927.

Board of Education of St. Louis v. National Surety Co. (1904) 183 Mo. 166.

Subsection (2). R. S. Mo. 1929, Section 2879 (Mo. St. An. Section 2879, p. 741), provides that judgment on a penal bond for the payment of money shall be rendered for the sum actually due, with interest and costs.

H - Mississippi Annotations

Subsection (1). Clause (a,b). Accord. Jones v. Mississippi Farms Co., 16 Miss. 295; Brown v. Staple Cotton Coop. Ass'n., 132 Miss. 659; Shields v. Early, 132 Miss. 282.

Clause (b). An agreement for stipulated damages or a penalty is unenforceable where the damages for the breach of the contract are fixed by law.

Failure to pay promissory note. Hughes v. Fisher, Walk. 516; Pyle v. Gentry, 127 Miss. 784. Or, where the damages are certain or easy of estimation.

Failure to comply with promise to pay money and execute note. Bright v. Rowland, 3 How. 398.

Agreements held to be (1) penalties; Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598; (2) liquidated damages; Hardie Tynes Foundry & Machine Co. v. Glen Allen Oil Mill, 84 Miss. 259; Coker v. Brevard, 90 Miss. 64; Jones v. Mississippi Farms Co., 116 Miss. 295; Brown v. Staple Cotton Coop. Ass'n., 132 Miss. 859; Shields v. Early, 132 Miss. 282.

Subsection (2). Accord. Bright v. Rowland, 3 How. 398; Coker v. Brevard, 90 Miss. 64; Tyle v. Gentry, 127 Miss. 784.

J - Nebraska Annotations

The Nebraska law is in accordance with the Restatement.

In the following cases the agreements were held to provide for liquidated damages and were sustained; Pankomin v. Gorder (1914) 97 Neb. 337 ($23.50 per month for breach of contract not to compete); Edward E. Gustin & Co. v. Nebraska Building & Investment Co. (1923) 119 Neb. 241 ($15,000 for breach of 99 year lease and agreement to build hotel); Van Horn v. Ericson Lake Co. (1925) 113 Neb. 332 ($3300 for breach of agreement to maintain or operate public utility for period of 15 years); Nebraska Wheat Growers' Ass'n. v. Smith (1927) 115 Neb. 177 (25¢ per bushel for breach of agreement to deliver wheat to cooperative marketing association).

In International Milling Co. v. North Platte Flour Mills (1930) 119 Neb. 325 effect was given to an agreement for liquidated damages in place of the difference between contract price and market price for breach of a sales contract. The court relied upon the express provisions of the Sales Act (Neb. Comp. Stat. 1929 Sec. 69-471) permitting this.

A stipulation for liquidated damages precludes the recovery of other damages incurred by reason of the specified breach. Jobst v. Hayden Bros. (1911) 88 Neb. 469.

In the following cases stipulations were held to provide for penalties and hence to be unenforceable: Brennan v. Clark (1890) 29 Neb. 385 ($10 a day for delay in completing building, on theory that damages would be rental value of building, easily computable); Lee v. Carroll Normal School Co. (1901) 1 Neb. (unoff.) 681, ($25 a day for delay in completing school building); Yant Constr. Co. v. Village of Campbell (1932) 123 Neb. 360, ($200 per month for delay in street improvement, court considering that damage to village was readily ascertainable).

Subsection (2). Is illustrated by Haffke v. Collins (1911) 89 Neb. 134 on the point of necessity of proving damages under a penal bond. Note also Gillilan v. Rollins (1894) 41 Neb. 540. A bond may be construed as providing for liquidated damages. Edward E. Gustin & Co. v. Nebraska Building & Investment Co. (1923) 119 Neb. 241; Van Horn v. Ericson Lake Co. (1925) 113 Neb. 332. That the penalty fixes the maximum recoverable is recognized by Mullen v. Morris (1895) 43 Neb. 596. See also Sexson v. Kelley (1873) 3 Neb. 104; Uldrich v. Gilmore (1892) 35 Neb. 288.

K - New York Annotations

This section is in accord with the New York Law, except as appears below in respect of Clause (1-b).

Clause (1-a). Where it appears that a breach of contract will probably result in substantial injury, but the circumstances are such that the amount of damages will be difficult or impossible of accurate estimation or proof, an agreement of the parties to pay a sum as liquidated damages will be upheld if it represents a bona fide preestimate which is not out of proportion to the probable loss.

This doctrine is illustrated by the following cases in which provisions for liquidated damages were upheld: Cotheal v. Talmadge, 9 N. Y. 551 (1854); Bagley v. Peddie, 16 N. Y. 469 (1857), bond for $3000 given by defendant as liquidated damages to secure faithful performance by plaintiff's employees; Wooster v. Kisch, 26 Hun 61 (1892) aff'd 94 N. Y. 630, licensee of patented article agreed to pay $1,000 to licensor for any refusal to permit inspection of plant; Tode v. Gross, 127 N. Y. 480 (1891), covenant by seller of cheese factory not to compete "under penalty of $5,000, which is hereby named as stipulated damages"; Hackenheimer v. Kurtzmann, 235 N. Y. 57 (1923), covenant by seller of stock of pianos and business not to use name "Kurtzmann."

Penalties. "It may be observed, generally, that whenever the damages flowing from the breach of a contract can be easily established, or the damages fixed are, plainly, disproportionate to the injury, the stipulated sum will be treated as a 'penalty'." Gray, J., in Mosler Safe Co. v. Maiden Lane S. D. Co., 199 N. Y. 479.

"It is also true that a stipulation to forfeit a certain sum for the breach of any of the terms of the contract cannot be separated and a part treated as a penalty and the remainder as liquidated damages * * * where a contract contains a number of covenants of different degrees of importance and the loss resulting from the breach of some of them will be greatly disproportionate to the sum sought to be fixed as liquidated damages, especially where the loss in some cases is readily ascertainable, the sum so fixed will be treated as a penalty. The strength of the payment is that of its weakest link." Andrews, J., in Seidlitz v. Auerbach, 230 N. Y. 167, 172-5 (1920), deposit to secure performance of all the covenants of a lease.

Neither the intention of the parties, nor the words used by them, is conclusive, though the courts in construing the provision frequently state that the intention and purpose of the parties is the decisive factor: Cotheal v. Talmadge, 9 N. Y. 551 (1854); Bagley v. Peddie, 16 N. Y. 469 (1857); Todd v. Gross, 127 N. Y. 480. * * * See also City of New York v. Brooklyn & M. Ferry Co., 238 N. Y. 52 (1924), pointing out that in case of doubt the tendency of the courts was to construe the provision as a penalty and not as liquidated damages.

Clause(1-b). The New York law is apparently contra. The agreement is almost always interpreted after the injury has occurrred, and the court is undoubtedly influenced by what has happened. It is usually stated, however, that the agreement is to be interpreted as of its date, not as of its breach: Dunn v. Morgenthau, 76 N. Y. S. 827 (1902), aff'd 175 N. Y. 518; Seidlitz V. Auerbach, 230 N. Y. 167, 172-175 (1920); Hackenmeier v. Kurtzmann, 235 N. Y. 57 (1923), affirming 198 App. Div. 691, 192 N. Y. S. 181, where the point was expressly decided. Plaintiff recovered $50,000 stipulated damages, notwithstanding evidence that the breach caused no substantial injury. This case is critically noted (1922) 7 Cornell L. Quart. 358. See also Frick Co. v. Rubel Corp., 62 F. (2d) 765 (C.C.A. 2d, 1933).

Subsection (2). Is in accord with the New York law. It is illustrated by the following cases: Lyon v. Clark, 8 N. Y. 148 (1853), recovery on a bond to secure the payment of money cannot exceed the face of the bond with interest; Beers v. Shannon, 73 N. Y. 292 (1878), action on a penal

bond to secure the discharge of a mortgage, plaintiff must prove the damages, and recovery may not exceed the penal sum with interest; Winkeman v. W., 208 App. Div. 68, 203 N. Y. S. 63 (1924), to the same effect, bond to secure the payment of money; City of New York v. Brooklyn & M. Ferry Co., 238 N. Y. 52 (1924); Guffanti v. National Surety Co., 234 N. Y. 192 (1922), surety bond; Burston v. Garrett Bldg. Corp., 252 N. Y. 280 (1929). This result also follows from the express provision in C.P.A. sec. 160.

A valid provision for liquidated damages may, however, be secured by a bond, and in this case the face of the bond may be recovered without proof of actual damages: Cotheal v. Talmadge, 9 N. Y. 551 (1854); Bagley v. Peddie, 16 N. Y. 469 (1857). Cf. City of New York v. Palladino 208 N. Y. 554, penal bond, but plaintiff's damages exceed the penalty.

Equitable relief is not barred by an agreement for liquidated damages, but would be barred by the promisor's election to pay a sum of money agreed upon as an alternative: Phoenix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400 (1882); Diamond Match Co. v. Roeber, 106 N. Y. 473 (1887); Zimmerman v. Gerzog, 43 N. Y. S. 339 (1897).

L - Ohio Annotations

This section is in accord with the law of Ohio.

In Doan v. Rogan (1909), 79 Ohio S. 372, 388, the Court held stating the substance of Clause (1) (a) in somewhat more elaborate form as follows: "* * * where parties to a contract and in terms provided that the damages of the injured party for some particular breach, or for a total breach of the contract, shall be a certain sum specified as liquidated damages, and it is apparent that damages for such breach would be uncertain as to amount and difficult of proof and the contract taken as a whole is not so manifestly unreasonable and disproportionate as to justify the conclusion that it does not truly express the intention of the parties but is consistent with the conclusion that it was their intention that damages in the amount stated should flow from such breach, it is the duty of the courts of law to give effect to the plainly expressed will of the contracting parties. * * *."

The following cases illustrate the doctrine, as stated in Doan v. Rogan, and sec. 330 (1) (b) (a); Mackenzie v. Stuber (1929), 119 Ohio S. 558; Jones v. Stevens (1925) 112 Ohio S. 43; Bramon v. The Ohio Poultry Producers Cooperative Ass'n., (1927), 27 Ohio App. 426; Burley Tobacco Growers' Coop. Ass'n., v. Gardner (1924), affirmed 114 Ohio 361 on other grounds.

Clause (2): Miller v. Blockberger (1924), 111 Ohio S. 798; Midwest Properties Co. v. Renkel (1931), 38 Ohio App. 503.

M - Rhode Island Annotations

Subsection (1). For a case in accord with this subsection see Bradstreet v. Baker, 14 R. I. 546 (1884), where defendants agreed to buy a quantity of ice from the plaintiff at a certain price and to pay the same price

for all ice not taken by them. The court held that this provision amounted to a penalty and would not be enforced. For a further case in accord with the proposition stated in this subsection, see Darcey v. Darcey, 29 R. I. 384 (1909), where the court construed the terms of the contract as providing merely for liquidated damages and not for a penalty or forfeiture. This case is a good illustration of Comment c.

For a further case in accord with the section, see Paolilli v. Piscitelli, 45 R. I. 354 (1923), where in connection with a contract for the sale and purchase of real estate for $6,000, containing a provision that either party who defaulted should pay the other the sum of $200, the court came to the conclusion that the contract was not one in the alternative, that the seller could be made to perform specifically and that the provision with reference to the $200 was in the nature of a penalty. The court said that the question of whether such a provision is to be regarded as establishing a penalty or liquidated damages, is to be decided upon consideration of the provisions of the whole agreement, in view of the circumstances in each case. And another case in accord with this section, see Wholey Boiler Works v. Lewis, 45 R. I. 441 (1924), saying that the question of whether a deposit or other payment is to be regarded as a penalty or liquidated damages is to be decided upon consideration of the provisions of the whole agreement, in view of the circumstances of each case. The contract provided for a bonus for the delivery of machines in advance of a certain date and for a penalty for the delay after that date. The court held that liquidated damages and not a penalty were intended.

N - Texas Annotations

Subsection (1,2). In the following cases the provision for liquidated damages was upheld: Yetter v. Hudson, 57 Tex. 604 (1882); Mazav v. Conner, 298 S. W. 641 (T.C.A. 1927); Talkin v. Anderson, 19 S. W. 852 (Tex. Sup. 1892); Levy v. Goldsoll, 62 T.C.A. 257, 131 S. W. 420 (1910), writ of error refused; Carruthers v. Gay, 91 S. W. 593 (T.C.A. 1906); Richardson v. Terry, 212 S. W. 523 (T.C.A. 1919), Reinhardt v. Borders, 184 S. W. 791 (T.C.A. 1916), writ of error refused; Magruder v. Poulton, 257 S. W. 533 (Comm. App. 1924); Lipscomb v. Fugua, 103 Tex. 585 (1911); Read v. Gibson & Johnson, 12 S. W. (2d) 620 (T. C. A. 1928), writ of error dismissed; Dutton v. Miller, 11 S. W. (2d) 551 (T.C.A. 1928); Pierce v. Peacock M. College, 220 S. W. 191 (T.C.A. 1920), Way v. Brice, 2 S. W. 2d 553 (T.C.A. 1928).

The form of words used is not conclusive: Yetter v. Hudson, 57 Tex. 604 (1882); Farrar v. Belman, 63 Tex. 175 (1884).

As to whether the intention of the parties is controlling see the following cases: Eaking v. Scott, 70 Tex. 442, (1888), where no actual damage accrued from the breach, and damages in this type of transaction were capable of definite ascertainment, the intention of the parties that the amount stipulated was to be liquidated damages controlled. Collier v. Betterton, 87 Tex. 440 (1895), holding that if the amount of damages named is out of proportion to the loss suffered, the provision will be treated as a penalty; Collins-Decker Co. v. Crumpler, 114 Tex.

528 (1925), in answer to certified questions approved of the Eakin case without reference to the Collier case, although the court of several appeals cited both in its question. See also, Cowart v. Connally & Co., 108 S. W. 973 (T.C.A. 1908), and Dilley & Son v. Wise & Hervey, 160 S. W. 985 (T.C.A. 1913).

There is a line of decisions that base their result on a degree of disparity between the damages stipulated and those actually suffered. McElvy v. Bell, 6 S. W. (2d) 330 (T.C.A. 1928); Kelsey V. Blackman, 293 S. W. 199 (T.C.A. 1927); Jones v. Mays, 248 S. W. 129 (T.C.A. 1923), writ of error dismissed for want of jurisdiction; Mathews v. Caldwell, 258 S. W. 810 (Comm, App. 1924).

Subsection 1 (1,b). Texas is contra to this subsection.

The contract is to be interpreted as of its date, and not of its breach, and if it reasonably appeared to the parties that the actual damages would be difficult to determine, the stipulation will be upheld. Eakin v. Scott, 70 Tex. 442, (1888); William v. Beasley, 300 S. W. 193 (T.C.A. 1927), writ of error refused, Santa Fe Ry. Co. v. Schutz, 37 T.C.A. 14 (1904), writ of error refused.

It seems that an agreement for liquidated damages, when interpreted as of its date, is not changed in character by the fact that after breach it appears that damages are certain in amount or capable of proof. Eakin v. Scott, 70 Tex. 442 (1888).

The same rule obtains though it be known that plaintiff did not suffer any actual damage at all. Eakin v. Scott, 70 Tex. 442 (1888); Nelson v. Richardson, 299 S. W. 304 (T.C.A. 1927), writ of error refused. But see Schwarz v. Lee, 287 S. W. 519 (T.C.A. 1926), writ of error dismissed for want of jurisdiction.

If the stated sum is found to be a penalty, the actual damages sustained will be the measure of recovery. Barrard v. Cantrell, 232 S. W. 911 (T.C.A. 1922), reversed on other grounds 240 S. W. 533 (Comm. App. 1922); Bowder v. Southern R. I. Plow Co., 203 S. W. 124 (T.C.A. 1918); Atwood v. Fagan, 63 T.C.A. 659 (1911); First National Bank v. Smith, 160 S. W. 311 (T.C.A. 1913), writ of error refused.

If actual damages exceed the stipulated penalty the full amount of the damages may be recovered. In Davis v. Wagner, 237 S. W. 612 (T.C.A. 1922), it was said: "The contract required a check to be paid up as honest money showing good faith. This, therefore, is not subject to be contained and treated as liquidated damages by way of the settlement of all damages that may inure to appellee by reason of appellant's breach. Not so at all. It must be treated as a penalty and stand as a breach and security to compensate for damages so far as it will go toward the loss occurring by reason of the breach.

Accord: Hough v. Fink, 141 S. W. 147 (T.C.A. 1911); Kellan v. Hampton, 58 T.C.A. 484 (1910); Dobbs v. Turner, 70 S. W. 458 (T.C.A. 1902); Palestine Ice, Fuel & Gin Co. v. Connally & Co., 148 S. W. 1109 (T.C.A. 1912), writ of error refused.

Subsection (2). The rule of this subsection is following in Texas and the damages in either a common law or a statutory penal bond are limited to the amount of the penal sum. Grand Lodge v. Cleghorn, 20 T.C.A. 134 (1898).

O - Wisconsin Annotations

Subsection (1). The Wisconsin cases are in accord with the Restatement.

The court is not bound by the name given by the parties to their agreement. If the sum fixed as damages is excessive or bears no reasonable relief to the probable damages resulting from a breach, it will be treated as a penalty. If, however, the sum fixed does not appear excessive, and the contract is of such a nature that the damages resulting from a breach are uncertain and difficult to ascertain, the sum fixed will be treated as liquidated damages: Fritz v. Woldenberg, 199 Wis. 99 (1929); Dekowski v. Stachma, 176 Wis. 154 (1922); Sheffield-King Milling Co. v. Jacobs, 170 Wis. 359 (1920); Keachie v. Starkweather Drainage District, 168 Wis. 389 (1919); Giant Marble Co. v. Marshall & Ilsley Bank, 166 Wis. 547 (1918); Studebaker Corp. v. Gollmar, 159 Wis. 579 (1915); Davis v. LaCrosse Hosp, Ass'n., 121 Wis. 579 (1904); Madison v. Am. Sanitary Eng. Co., 118 Wis. 480 (1903); J. G. Wagner Co. v. Cawker, 113 Wis. 532 (1902); Seiman v. Bieman, 108 Wis. 365 (1900).

Where not in conflict with the general effect of its terms, or the rules of law concerning penalties, and liquidated damages, the wording of the contract will be given effect: Elmor Realty Co. v. Genz (Wis.) 241 N. W. 632 (1932).

A provision in a contract of employment, where the damages to which the employer might be subjected by the employee's breach were uncertain, that the employer might retain 15 days' wages for a breach of the contract was held to be a provision for liquidated damages. Walsh v. Fisher, 102 Wis. 172 (1899).

Subsection (2). The law of Wisconsin is in accord with the Restatement.

This matter is governed by Wisconsin Statute, Section 270.61.

"Damages in actions on bonds, etc. In all actions brought for the breach of the conditions of a bond or to recover a penalty for non-performance of any covenant or agreement if the plaintiff recover his damages shall be assessed and judgment entered for the amount thereof, and enforced as in other actions upon contract. No such judgment shall conclude any claim upon such bond, covenant or agreement not embraced in the pleadings or by a discharge of the penal sum binding the amount of damages recovered thereby. This section does not apply to actions regulated by chapter 19.

Chapter 19 referred to in the above statute governs official bonds.

"The provisions of this statute, the amount of a bond cannot be recovered where the damages are less than the penal sum, but judgment for the actual damages only is entered: Whereatt v. Ellis, 103 Wis. 348 (1899); Heidtke v. Kraus, 97 Wis. 118 (1897)."

Where the amount of damages exceeds the penalty of the bond, judgment may be recovered for the amount of the penal sum with interest: Whereatt v. Ellis, 103 Wis. 348 (1899).

V. FEDERAL JURISDICTION

The earlier federal decisions followed the English courts in their treatment of the subject of liquidated damages and penalties and, in brief, took the position that in a contract involving a provision for the payment of damages in case of a breach the sum named therein, even though expressly stated to be liquidated damages, would be held to be a penalty if the sum stipulated was unreasonable, or unjust, or oppressive, or extravagant, or disproportionate to the actual damages.

> Tayloe v. Sandiford, 7 Wheat. 13, 5 L. ed. 384; Spencer v. Tilden, 5 Cowen, 151; Noyes v. Phillips, 60 N.Y. 411; Gay Mfg. Co. v. Camp, 13 C.C.A. 137, 25 U.S. App. 134, 65 Fed. 794, 15 C.C.A. 226, 25 U.S.APP. 376, 68 Fed. 67; Ward v. Hudson River Bldg. Co., 125 N.Y. 230, 26 N.E. 256; L Sedgw. Damages, 8th ed. pp. 358, 583-586; Colwell v. Lawrence, 38 N.Y. 74; Peeksill, S.C. & M.R. Co. v. Peekskill, 21 App. Div. 94, 47 N.Y. Supp. 305; 1 Pom. Eq. Jur. 2d ed. sec. 440; David v. United States, 17 Ct. Cl. 201; Watts v. Camors, 115 U.S. 353, 29 L. ed. 406, 6 Sup. Ct. Rep. 91; Mayne Damages, 5th ed. 1894, p. 148; Charleston Fruit Co. v. Bond, 26 Fed. 18.

If the intent was at all doubtful, the tendency of the courts was in favor of the interpretation which made the sum a penalty.

> 1 Pom. Eq. Jur. 2d ed. sec. 440; Harris v. Miller, 6 Sawy. 319, 11 Fed. 118; Dimech v. Corlett, 12 Moore, P.C.C. 199; Jones v. Green, 3 Younge & J. 304; Green v. Price, 13 Mees. & W. 701, 16 Mees & W. 346; Betts v. Burch, 4 Hurlst. & N. 511; Cushing v. Drew, 97 Mass. 445; Wallis v. Carpenter, 13 Allen 19; Lynde v. Thompson, 2 Allen, 456; Streeper v. Williams, 48 Pa. 450.

Beginning with the case Sun Printing & Publishing Ass'n. v. Wm. L. Moore, 183 U.S. 642, the U. S. Supreme Court emphasized the principle that the intention of the parties in agreements containing such provisions is to be arrived at by a proper construction of the agreement made between them and reviews the development of liquidated damages and penalty clauses in agreements from the common law and after the adoption of the statute of 8 & 9 Wm. III. The argument of the appellant was to the effect that the naming of a stipulated sum to be paid for the nonperformance of a covenant is not conclusive upon the parties merely in the absence of fraud or mutual mistake; that if the amount is disproportioned to the loss, the court has the right and the duty to disregard the particular expressions of the parties and to consider the amount named merely as a penalty, even though it is specifically said to be liquidated damages. The contention made was said to be expressed in the reasoning of the opinions in Chicago House-Wrecking Co. v. U.S., 106 Fed. 385, and Gay Mfg. Co. v. Camp, 65 Fed. 794, 38 Fed. 67, viz. "Where actual damages can be assessed from testimony," the court must disregard any stipulation fixing the amount, and require proof of the damage sustained. The court by Mr. Justice White stated "we think the asserted doctrine is wrong in principle, was unknown to the common law, does not prevail in the courts of England at the present time, and it is not sanctioned by decisions of this court," and then proceeded to review the history of liquidated and penalty sums. After setting forth the situation at common law and the effect

of statute 8 & 9 WM. III, Chapter 11 stated "While the courts of the United States, in actions at law, undoubtedly possessed the power conferred upon the courts at common law by the statute of 8 & 9 Wm. III, and while recognition of such power was embodied in the judiciary act of 1789, reproduced in section 961 of the Revised Statutes, the duty of such courts to give effect to the plainly expressed will of contracting parties is as imperatively necessary now as it was at common law after the adoption of the English statute."

In referring to some of the adjudications of this court, it stated "decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not bona fide, in a case where the damages are of uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has constantly maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation made to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract." Then follows a review of several decided cases in England, the court stating: "The courts in England as already intimated, constantly maintain the right of individuals, when contracting with each other, to estimate the value of property or otherwise determine the quantum of damages for a breach of an agreement where the damage is of uncertain nature." (Citing Irving v. Manning, (1847) 1 H.L.Cas. 287,307,308; Ranger v. Great Western R. Co., (1854) 5 H.L.Cas.72,94,104,118; Dimech v. Corlett (1858) 12 Moore, P.C.C. 199,229; Elphinstone v. Mongland Iron & Coal Co. (1886) L.R. 11 App. Cas. 332, 345, 346; Price v. Green (1847) 16 Mees. & W. 346, 354.

The court then went on to refer to the character of the stipulations under consideration each rendering it unnecessary to review in detail the decisions of state courts and while suggesting much contrariness of opinion on some phases of the doctrine, proceeded to distinguish the state cases argued in support of the appellant's contention and similarly concluded that "It may, we think, fairly be stated that when a claimed disproportion has been asserted in actions at law, it has usually been of excessive disproportion between the stipulated sum and the possible damage resulting from a trivial breach apparent on the face of the contract, and the question of disproportion has been simply an element entering into the consideration of the question of what was the intent of the parties whether bona fide to fix the damages or to stipulate the payment of an arbitrary sum as a penalty, by way of security."

The emphasis on construction of intention is again shown in U.S. v. Bethlehem Steel Co., 205 U.S. 105 where, in an action on a contract with the government for the construction of certain disappearing gun carriages, in which contract there was a clause providing for a deduction of $35 from the purchase price for each day's delay in delivery, the court by Mr. Justice Peckham, at p. 119, stated: "There has, in almost unnumerable instances, been a question as to the meaning of language used in that part of a contract which related to the payment of damages for its nonfulfilment, whether the provision therein made was one for liquidated damages or whether it meant a penalty simply, the damages to be proved up to the amount of the penalty.

This contract might be considered as being one of that class where a doubt might be claimed, if nothing but the contract were examined. The court at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. This whole subject is reviewed in Sun Printing & Pub. Ass'n v. Moore, 183 U.S. 642, 669, 46 L. ed. 366,380, 22 Sup. Ct. Rep. 240, where a large number of authorities upon this subject are referred to. The principle decided in that case is much like the contention of the government herein. The question always is, What did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out."

In deciding that it was the intention of the parties to that contract that the amount specified should be regarded as liquidated damages and not technically as a penalty the court took the occasion to state that "this view is also strengthened when we recognize the great difficulty of proving damage in a case like this, regard being had to all the circumstances heretofore referred to" and further, "the circumstances were such that it would be almost necessarily impossible to show what damages (if any) might or naturally would result from a failure to fulfil the contract" and again "the amount is not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages as to show that the parties must have intended a penalty, and could not have meant liquidated damages."

In advancing the concept of the freedom of contracts and in laying stress upon construing the intention of the parties in adjusting in advance the settlement of breaches of contracts by liquidated damage provisions the Supreme Court of the United States had this to say in the case of Wise v. U.S. 249 U.S. 361,

> "The subject of the interpretation of provisions for liquidated damages in contracts, as contradistinguished from such as provide for penalties, was elaborately and comprehensively considered by this court in Sun Printing & Pub. Ass'n v. Moore, 183 U.S. 642, 46 L. Ed. 366, 22 Sup. Ct. Rep. 240, applied in United States v. Bethlehem Steel Co., 205 U.S. 105, 51 L. ed. 731, 27 Sup. Ct. Rep. 450, and the result of the modern decisions was determined to be that in such cases courts will endeavor, by a construction of the agreement which the parties have made, to ascertain what their intention was when they inserted such a stipulation for payment of a designated sum, or upon a designated basis, for a breach of a covenant of their contract, precisely as they seek for the intention of the parties in other respects. When that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where the damages are uncertain in nature or amount, or are difficult of ascertainment, or where the amount stipulated for is not as extravagant, or disproportionate to the amount of property loss, as to show that

compensation was not the object aimed at, or as to imply fraud, mistake, circumvention, or oppression. There is no sound reason why persons competent and free to contract may not agree upon this subject as fully as upon any other, or why their agreement, when fairly and understandingly entered into with a view to just compensation for the anticipated loss, should not be enforced.

"There are no doubt, decided cases which tend to support the contention advanced by appellant, but these decisions were, for the most part, rendered at a time when courts were disposed to look upon such provisions in contracts with disfavor, and to construe them strictly, if not astutely, in order that damages, even though termed liquidated, might be treated as penalties, so that only such loss as could be definitely proved could be recovered. The later rule, however, is to look with candor if not with favor, upon such provisions in contracts when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights, as promoting prompt performance of contracts, and because adjusting in advance, and amicably, matters the settlement of which through courts would often involve difficulty, uncertainty, delay and expense.

"The parties to the contract, with full understanding of the results of delay, and before differences or interested views had arisen between them, were much more competent to justly determine what the amount of damage would be - an amount necessarily largely conjectured and resting in estimate - than a court or jury would be directed to a conclusion, as either must be, after the event, by views and testimony derived from witnesses who would be unusual to a degree if their conclusions were not, in a measure, colored and partisan."

That the amount stipulated in a liquidated damage provision must not be so disproportionate to any damage reasonably to be anticipated in the circumstance, was emphasized in the Kothe Case (Kothe, Trustee, v. Taylor Trust, 280 U.S. 224). In that case which involved a lease for two years between the parties, the lessee agreed that the mere filing of a petition in bankruptcy against him should be deemed a breach and that thereupon the lease should terminate, and the lessor become entitled to reenter and also to recover damages equal to the full amount of the rent reserved for the remainder of the term. In holding the liquidated damage aspect unenforceable the court by Mr. Justice McReynolds after referring to the Sun Printing Case and the Bethlehem Steel Case, stated "But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced. This circumstance tends to negative any notion that the parties really meant to provide a measure of compensation - to treat the sum named as estimated and ascertained damages." Referring to U.S. v. United Engineering Co., 234 U.S. 236, 241 in declaring the provision an unenforceable penalty, the court pointed out that the amount stipulated was disproportionate to any damage reasonably to be anticipated from the circumstances disclosed, and stated, "The parties were consciously undertaking to contract for payment to be made out of the assets of a bankrupt estate - not for something which the lessee personally would be required to discharge. He, therefore, had little, if any, immediate concern with the amount of the claim to be presented; most probably, that would affect only those entitled to share in the

proceeds of property beyond his control." It was felt that the agreement tended to defeat the beneficent design of the Bankruptcy Act and that the real design of the challenged provision was to insure to the lessor preferential treatment in the event of bankruptcy.

At this point perhaps reference should be made to a few cases indicating the treatment of this subject in the courts below and serving to emphasize the principles hereinabove enumerated:

Belstrat Hotel Corp. v. Sarnoff, 37 F. (2d) 16 (in the Second Circuit). In an appeal from the District Court for the Second District of New York this court, citing the Sun Printing Case, construed the deposit provisions of the lease in question as indicating that the parties did not regard the deposit money as liquidated damages. "The parties, intended, by the terms of the lease, that the deposit should be as security for actual damages."

In re Gelino's Inc., 43 F. (2d) 833: In this case, under a contract to install a preferred cable cash system in bankrupt's store, the bankrupt was required to pay instalments over a period of 10 years. The agreement provided that if during the term bankruptcy proceedings were commenced, all unpaid instalments should without notice be at once precipitated and become due and payable, and the owner would be entitled to retake possession and remove the system and that the user's interest therein should be valued at 20 per cent of the amount of payments for the unexpired term. The claimant retook possession of the system and presented a claim for unaccrued instalments less the discount of 20 per cent. The court in disallowing the claim as a penalty pointed out, at pages 833 and 834:

> "A provision in a contract as to the sum to be paid in case of breach will, if it is a provision of liquidated damages, be enforced according to its terms. If it is a provision for a penalty, the recovery will be limited to the actual damages sustained. Illinois Surety Co. v. U.S. (C.C.A.) 229 F. 527. Whether a sum named in a contract to be paid by a party in default on its breach is to be considered liquidated damages or merely a penalty, is one of the most perplexing and difficult inquiries encountered in the construction of written agreements. Wilson v. Baltimore, 83 Md. 213, 34 A. 774, 55 Am. St. Rep. 339. The question is one to be determined by the contract fairly construed. Sun Printing etc. v. Moore, 183 U.S. 642, 22 S. Ct. 240, 46 L. ed. 366. Pertinent are the circumstances bearing upon the proper construction of and consideration of the instrument as a whole, the situation of the parties, the subject-matter of the contract, the magnitude of the stipulated sum as compared with the value of the subject-matter, and in proportion to the probable consequence of the breach 17 C.J. 936. It is commonly said that where it is doubtful whether the provision should be deemed for a penalty or for liquidated damages, the courts incline to regard it as for a penalty. London v. Shelby County Taxing Dist., 104 U.S. 771 26 L. ed. 923; Tayloe v. Sandiford, 7 Wheat. 13, 5 L. ed. 384; 17 C.J.937.
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> "Where the sum named in a contract to be paid on a breach is wholly disproportionate to the actual damages sustained, the

courts will deem the parties to have intended to stipulate for a mere penalty to secure performance, and not for a liquidation of the damages. In re Liberty Doll Co. (D.C.) 242 F.695; Smith v. Copiah County (D.C.) 239 F. 425. The same situation results where it is obvious that the principle of compensation has been disregarded. Decker v. Pierce, 191 Mich. 64, 157 N.W. 384; 17 C. J. 945."

Larabee Flour Mills Co. v. Carignano, 49 F. (2d) 151 (C.C.A.-10th Cir.). This was an action at law for breach of a contract to buy flour. The contract provided for liquidated damages in case of the buyers failure to furnish shipping instructions on the basis of 1/3¢ per day per barrel of flour from date of sale to date of termination as expense of carrying, plus 20¢ per barrel as cost of selling, and plus or minus the amount of the difference between the market value of wheat on the date of sale, and the date of termination, times 4.6 times the number of barrels of flour. The trial court submitted to the jury the question of whether the liquidated damage provision was in violation of an Ohio statute which provides that "where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered. On the appeal defendants sought to justify the submission of this question under sections 5068 and 5069, C.C.S. 1921, which prohibit stipulations as to damages, except "when, from the nature of the case, it would be impracticable and extremely difficult to fix the actual damage." This court regarded such submission as error on the ground that it was satisfied that the record brought the case within the precise words of the statute - that it was "impracticable and extremely difficult to fix the actual damage." It stated that similar provision in contracts for the manufacture and sale of flour had been many times sustained citing Yerxa, Andrew & Thurston v. Randazzo Macaroni Mfg. Co., 315 Mo. 927; Sheffield-King Milling Co. v. Jacobs, 170 Wis. 589; Sheffield-King Milling Co. v. Domestic Science Baking Co., 95 Ohio St. 180; International Milling Co. v. Rierson, et al (S.D.), 225 N.W. 218; New Prague Flouring Mill Co. v. Hewett Grain & Provision Co., 226 Mich. 35; H.H. King Flour Mills Co. v. Bay City Baking Co., 24 Mich. 79.

The court then went on to state, "Furthermore, there is a distinct trend toward a relaxation of the rules as to liquidated damages. Courts have always abhorred penalties, and have looked closely to see that penalties were not masquerading as liquidated damages. And if the stipulation is in fact a penalty - if it bears no fair relation to the damage contemplated - it will not be enforced, no matter what it may be called. And if there is available an accurate and readily ascertainable method of fixing the damages, courts will assess the damages accordingly. In the complexities of modern business, breaches of contract involve more incidental but real damage than when business was less complicated; in later years, business men and associations of business men have been more desirous of contracting as to damage, in order that their liability may be known rather than unknown quantity. Responding to these changing conditions in the business world, the courts have been much less reluctant than formerly to enforce provisions for liquidated damages.

Boston Wire and Metal Company v. U.S., 55 F. (2d) 126 (C.C.A - 4th Cir.) - the Boston Company entered into written contract with the

United States, through the shipping Board, for the purchase of five steamships for $175,000. The buyer was to remove the steamships on or before a date expired, and scrap and dismantle the same on or before another expired date to prevent their further use and operation as steamships. The agreement recited that if the buyer should fail to do any of the things as provided, the seller would be greatly damaged and that such damages could not be ascertained with any degree of definiteness or certainty; that the buyer would pay, as liquidated damages and not as a penalty, $100 for each vessel not scrapped or destroyed for each day the buyer was in default. Of two questions of importance raised by the appeal one was whether the amount fixed to be paid in the event of a breach was a penalty or liquidated damages. The court held that the actual damage was impossible of ascertainment and in upholding this provision cited Mr. Justice McReynolds in Kothe v. R.C. Taylor Trust, 280 U.S. 224, U.S. v. United Engineering Co., 234 U.S. 236, 241, and the Sun Printing Case, 183 U. S. 642. The Court referred to its position in Detroit Company v. Wyatt Co., 1 F. (2d) 788,789: "The contract is embraced with a strong presumption that the officers and counsel of these large corporations knew the meaning of the language they used and intended what they said * * * the courts will disregard the specified intention of the parties to provide for such liquidated damages only when the principle of compensation is evidently destroyed."

American Surety Co. v. Hutchinson, 63 F. (2d) 537 (C.C.A. 5th Cir.)- In this action to recover on a surety company bond guaranteeing compliance with the terms of a lease, the appellant contended that the bond was for a penalty. The court, at page 538, stated "It is immaterial whether a bond in terms provides for a penalty or liquidated damages. The court will construe the instrument according to the intent of the parties. Conceding that, in order to do justice, courts usually construe bonds such as here involved as providing for a penalty, nevertheless the parties to a contract may stipulate for liquidated damages instead of a penalty. If the amount is reasonable and it is evident that proof of actual damages would be difficult, the contract will be enforced."

Frick Company v. Rubel Corp., 62 F (2d) 765, (C.C.A. 2d Cir.). In this case the plaintiff was a manufacturer of ice making machinery which it installed in the defendant's premises pursuant to contract. The action was brought to recover the contract price and liquidated damages for the defendant's delays in accepting delivery of the apparatus. The court considered the validity of the liquidated damages clause and concluded, "The proof, and even offer of proof, did not show that at the time when the contract was made - which is the relevant moment - the clause was not genuinely intended as a liquidation of losses otherwise difficult of appraisal."

The trial judge had refused to allow the defendant to prove that the liquidated damages were wholly disproportionate to the actual losses suffered by the plaintiff because of the delay. Defendant then offered to prove that the actual loss which was made necessary, the cost entailed by the alleged delay, was infinitesmally small as compared with the penalty, and the judge refused to allow such proof. On these points this court stated:

"It will be observed that the defendant did not offer to prove

disparity between the amount fixed as liquidated damages and the losses which were in contemplation when the contract was signed. Unless proof of the actual losses was material to that issue, the offer was of irrelevant evidence, and no question arose whether gross disproportion between liquidated damages and losses in contemplation would be evidence that the clause was penal. That question itself turns on how far some of the language in Sun Printing & Publ. Co. v. Moore, 183 U. S. 642, 672-674, is to be read literally, and how far it has been modified by U.S. V. Bethlehelm Steel Co., 204 U.S. 103, U.S. v. United Engineering & Const. Co., 235 U.S. 236, and Wise v, U.S., 249 U.S. 361, 365, and by the decision in Kothe v. R.C. Taylor Trust Co., 280 U.S. 224.

"My brothers think, though I do not, that evidence as to the actual loss was not material to the issue of the losses in contemplation, though we all agree that it is the comparison of the liquidated damages with the last, not the first, which can raise the point at all. On their view, the offer did not therefore raise the question, and it follows that judgment was right, and that the judgment on the second and third causes of action must also be affirmed."

VI. LIQUIDATED DAMAGES UNDER THE NATIONAL INDUSTRIAL RECOVERY ACT

Except as indicative of an effective weapon in the hands of certain Code Authorities or other denominated administrative agencies, the experience with liquidated damage provisions in the codes of fair competition under the administration of the N.I.R.A. is of little value in the treatment of this subject. The policy of the N.R.A. was as stated in the NRA Office Manual II-1626, et seq. It was thought that this policy was affectuated and would effectuate the NIRA by administrative approval of agreements entered into by those industry members who desire to do so, embodying clauses liquidating damages for violations of wage, hour, and other labor provisions, and provisions involving transactions incidental and nonincidental, respectively, to sales of industry products. In retrospect, one is inclined to doubt the validity of such procedure (without any desire to level any criticism whatsoever). The fact that such agreements were voluntary did not thwart the applicability of the principles herein enumerated. And, in the light of such principles, there appear certain obvious difficulties - equally applicable to voluntary industry agreements covering labor conditions and fair trade practices.

Dealing with labor conditions - wages and hours - the breach of a provisio in such agreements pursuant to which the signatories agree to pay not less thar a specified minimum wage involves, for the purposes of this discussion, two happenings. There is first of all, the tangible occurrence of the payment of a lesser wage which is obviously capable of computation and beyond actual restitution to the employees, without necessary predetermination. To the extent that it might serve as the basis for a cause of action as between employer and employee, the liquidated amount is merely repetitious of the amount recoverable by the employee; to the extent that it constitutes a breach of the agreement as among signatories the payment to them would be totally unrelated to the damages sustained and hence a penalty. The payment to them could only be justified on a showing of actual damages and a reasonable relationship thereto of the amount agreed upon. Then, there is also the intangible happening - the payment of a lesser wage, permitting a lower price with the consequent unfair competition, loss of business, diversion of trade, etc. The first question that would arise in connection with this subject would be the matter of damages. Are they capable of proof? If not, the subject to be liquidated would seem to be absent. But beyond this, what yard stick is available under such circumstances in a nation-wide industry to form a basis of computation pursuant to the requirement of a reasonable relationship between the liquidated amount and the probable damage? While there are certain industries, the manufacturers of whose products confine themselves to so-called marketing areas and in which the diversion of trade could undoubtedly flow from the intrusion of an outsider paying less than a minimum wage in violation of an agreement, how could it be shown that this element alone was responsible for such happenings with a consequent damage to the members in the marketing area?

It seems to me that these weaknesses apply with equal force to maximum hour limitation provisions, and with greater force when attempting to fix a reasonable amount as liquidated damages for breaches of provision relating to child labor and the so-called consumer benefit trade practices - false advertising, etc., and even with relation to those competitive practices set up primarily for the benefit of the signatories - price-filing, uniform discounts commercial bribery, etc. - it is difficult to escape the conclusion that the

amounts agreed upon as liquidated damages would not literally be penalties to insure compliance.

There were fifteen approved codes containing liquidated damage provisions. It would seem from a study which was made of the operation of these Codes that the assessing of damages pursuant to the agreements was quite effective in procuring compliance and facilitating administration. It is to be noted, however, that the agreements, or any payments required thereunder, have never-so far as is known - been tested in the courts, and consequently it would be probably a mistake to place much weight or importance to such measures. It is said that $10 per ton, the liquidated damage figure in the Iron and Steel Code was an arbitrary figure with the basis of computation not being shown anywhere as reasonably relating to the damages sustained, the theory being that for most products the figure was sufficiently prohibitive to induce compliance, and in the Motor Vehicle Retailing Code the amounts were levied within the maximum prescribed but in relation to the "heinousness" of the violation. In some of these codes the liquidated damage provisions never became operative.

Incidental to the question of the validity of such provisions in the codes in the first instance, the promulgation of an additional remedy not provided for in the statute (NIRA) even though under the guise of voluntary action, was of at least doubtful sanction in law. (See Progressive Miners, etc. L. Union No. 109 v. Peabody C.Co., 7 F. Supp. 340 345.) It is a general rule in the construction of statutes under the doctrine of expressio unius est exclusio alterius that where a new right is created or a new duty imposed by statute, if a remedy be given by the same statute for its violation or nonperformance, the remedy given is exclusive. 1 C.J. 988-890. (See Page v. New York Realty Co., 196 P. 871, 59 Mont. 305, citing Lewis-Sutherland on Statutory Construction (2d Ed.), Section 491; see also Globe Newspaper Co. v. Walker, 210 U.S. 356, 52 L. ed. 1096; and Standard Oil Co. (Ind.) v. U. S. et al., 283 U.S. 231.) In this connection there is attached a copy of the opinion of the Attorney General of the United States on the question whether the Federal Alcohol Control Administration had power to compromise civil and criminal liability for violations of codes of fair competition for the various alcoholic beverage industries. A few lines are quoted therefrom "* * * Penalties are purely the creatures of the legislature. They cannot be created by judicial implication, but must be expressly imposed by statute, etc. * * * The National Industrial Recovery Act does not provide for civil penalties. * * * It is also urged by the Administration that payment of the civil penalties to be assessed by the Administration would be entirely voluntary. However, criminal prosecution or permit revocation might, and probably would, result from a refusal to pay the civil penalty, and it is difficult to reach the conclusion that such payments would be held to be entirely voluntary.* * *"

There is therefore need at least for an enabling statute providing for such a means of enforcement, and the question that immediately presents itself is how far can and need the statute go in this respect.

ASSOCIATION PENALTIES - DAMAGES IN ANTI-TRUST SUITS

Little support can be found for the payment of stipulated sums as liquidated damages in voluntary agreements in the somewhat general line of authority affirming the power of associations or groups to maintain their purposes by the assessment of fines or penalties; these appear to constitute separate

rules of substance. Even in these cases the reasonableness of the sum stipulated to be paid seems to have been an important consideration. (See U. S. v. Fur Dressers' & Fur Dyers Ass'n., 5 F. (2d) 869; State v. Carondolet Planing Mill Co., 309 No. 353; Bossert v. Dhuy, 221 N.Y. 342; and Cohn & Roth Elec. Co. v. Bricklayers Union, 92 Conn. 161.)

In anti-trust cases the mention by the courts of the presence or absence of the provisions in the combination agreement for the payment of a specified sum for a breach thereof as a circumstance in determining whether the combination offends against the anti-trust statutes would appear to raise some question as to whether such provisions might not affect the validity of the combination so far as the anti-trust laws are concerned. But this question is merely academic because of one of our original assumptions. (See American Linseed Oil Co. Case, 262 U.S. 371, and the Maple Flooring Mfrs. Ass'n Case, 268 U.S. 563.)

Incidentally, in connection with the damage suits arising out of a breach under the Anti-trust Laws, sections 15, Title 15, U.S. C.A., which provides "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefore* * *and recover threefold the damages by him sustained* * *", recovery cannot be had unless it is shown that as a result of the defendant's acts damages in some amount susceptible of expression in figures resulted, and the damages must be proved by facts from which their existence is logically and legally inferrable, and cannot be supplied by conjecture. (See Keogh v. Chicago & N.W.R.Co., 260 U.S. 156.) In Eastman Co. v. Southern Photo Co., 273 U. S. 359, which was a suit to recover damages for a violation of the Sherman Act Mr. Justice Sanford in delivering the opinion of the court, quoted approvingly from the opinion of the court of appeals below, which stated:

> "'The plaintiff has an established business, and the future profits could be shown by past experience. It was permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.' This, we think, was a correct statement of the applicable rules of law."

And further on:

> "The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference."

VII. LIQUIDATED DAMAGES IN COOPERATIVE MARKETING AGREEMENTS

The experience with the cooperative marketing associations can perhaps be cited to indicate some direction.

A cooperative association inherently is a mutual enterprise. The members commonly put their products into a common mass and draw their return out of a common fund, after the expenses of the operation have been met. The word generally used to describe these joint activities is pooling, which connotes the mingling of products of equal grade during a definite period, so that the member receives ultimately the average net price obtained by the Association in selling the type of product the member delivered. The purpose of pooling is to improve the bargaining position of the growers, to distribute price fluctuations, physical deterioration, and other inevitable risks, and losses over the whole product, and to expand the market for the commodity by controlling the time, place, and methods of its sale. Marketing contracts are either of the agency type or of the purchase and sale type, and they usually state that the association must accept delivery, handle, grade, insure, process, pool, and market the products, and return the proceeds, minus certain deductions for expenses and reserves. The cooperatives early developed the theory that the members by establishing the association were creating a selling agency, for whose continuing operation they should be burdened with an annual charge or a charge at least so long as they had produce to market. In the normal course of dealings, this charge would be paid out of deductions from the proceeds of products marketed for the members, measured by stipulations contained in the by-laws, association agreement, or the member's contract. The maintenance clauses in cooperative contracts were attacked as penalties and were defended as assessments for facilities and as liquidated damages. In Alfalfa Growers of Calif. v. Icardo, 82 Calif. App. 723, 256 P. 287 (1927), the plaintiff was a cooperative membership association organized under the California Cooperative Act. of 1909. The four defendants constituted a partnership member of the association. The association sued to recover an assessment levied against the membership. The court held for the defendants although the articles of incorporation and the by-laws both provided that the directors might levy assessments on members in proportion to the acreage controlled. The court pointed out that the statute under which the association was organized gave no specific authority to levy assessments. While admitting authority for the proposition that the power to assess might be created by contract, the court asserted that in this case there was no way to make equitable assessments. Not only were persons engaged in producing, preserving, packing, or preparing for market, etc., eligible for membership, but it was a matter of common knowledge that the quantity and quality of alfalfa varied greatly from acre to acre.

The first of the devices employed by cooperatives to hold members to their contractual obligations was the stipulation for liquidated damages (See 15 Cal. L. Rev. 97). These damages, fixed in an amount designed to cover both the tangible and the imponderable losses suffered by the association if the member defaulted on his agreement to make delivery, have been a feature of the cooperative contracts either in the form of maintenance clauses, or otherwise, since comparatively early in the cooperative movement. John Hanna, in his book "Law of Cooperative Marketing Associations" states, at Sec. 124, "Today, the right to liquidate

damages is confined to cooperatives by statute in practically all American jurisdictions."

The relevant provisions in the Standard Cooperative Marketing Act (see Cooperative Marketing letter from the Federal Trade Commission, 70th Congress, 1st Sess., Gen.Doc. No. 95, p. 326), section 18, paragraph (a) are as follows: "The By-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding or products; and may further provide that the member will pay all costs, premiums and bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties."

Mr. Hanna further states that the cooperative associations were frequently successful in recovering liquidated damages even before the period of the present liberal cooperative marketing acts, and this is borne out in such cases as Ex Parte: Baldwin Co. Producers Corp., 203 Ala. 345; Washington Coop. Egg & Poultry Ass'n. v. Taylor, 122 Wash. 466; Bullville Milk Producers Ass'n v. Armstrong, 173 N.Y.S. 612; Burley Tobacco Society v. Gillaspy, 51 Ind. App. 583; and Ansheim Citrus Fruit Ass'n v. Yeoman, 51 Cal. App. 759. But the significant thing in connection with these decisions for the purposes herein, is indicated, for example, in the opinion of James, J., in the last case cited herein. The court stated, after discussing the concepts of penalties and liquidated damages, at page 763:

> "The association was organized for the purpose of the better handling of citrus fruits through the cooperative and joint effort of its members. From the nature of the organization and the statements of its purposes as found in its articles and by-laws, it can be fairly and reasonably inferred that by the cooperation of its members, mutual advantages would accrue to all through greater economy in handling and shipping and the securing of more generous marketing facilities. These results would be dependent directly upon the performance by the members of this agreement to deliver their fruit into the hands of the association for the purposes declared. Defendant sought to show at the trial that the damage which would accrue to the association by reason of any of its members failing or refusing to market their fruit through the association could be easily and exactly estimated, and that such damage would consist wholly of an approximate amount of overhead operating cost. By the line of questioning pursued, it was made clear that the association did suffer on actual monetary loss by reason of the failure of the defendant to deliver his fruit to the association packing house for the market, as he had agreed to do, and in the very nature of the case we do not think that such damage should be the only damage considered to have been suffered by the plaintiff. Other elements have already been suggested. The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of

> fruit so handled would not only tend to increase the overhead cost to the nontransgressin members, but, we may assume, to some extent effect the prestige and standing of the association as a marketing concern. His argument would be the same, regardless of the quantity of fruit which might have been handled by the defendant, whether it composed but a small fractional part or one-half or more of the entire product designed to be marketed by the plaintiff agency. Enough has been said, we think, to show that the case falls within the class as to which the law permits damages to be liquidated by contract in advance of its occurrence."

It is therefore the unique or, at least, special position occupied by the association in these agreements and the recognition of the economic significance in such instances which have aided in the development and the availabity of this remedy to suit the needs of these organizations.

Reverting to the agency which is contemplated in relation to voluntary industry agreements, it becomes at once apparent that there is little analogy, and except as a central body to serve as a check and otherwise administer the agreement in behalf of all the signatories, liquidated damages would bear little relationship to the duties exercised by and the expenses incidental to such an agency.

Where cooperative associations failed in their efforts to enforce liquidated damage provisions in contracts or by-laws, the administrative holding was sometimes due to the court's opinion that the damage clause merely prescribed a penalty (see Dairymen's League Coop. Ass'n. Inc. v. Holmes Bros., 207 A.D. 429, 202 N.Y.S. 683), but more frequently because the contract was considered in restraint of trade. At the present time, so long as the liquidated damage stipulations bear some reasonable relationship to the damages which might in fact be sustained, the cooperative will have little difficulty in obtaining a judgment against the member contract breaker for the liquidated amount. (Poultry Producers of Central Calif. v. Murphy, 64 Cal. App. 450; California Bean Growers Ass'n. v. Sanders, 86 Cal. App. 689; Lee v. Clearwater Growers Ass'n. 93 Fla. 214; Harrell V. Cane Growers Coop. Ass'n. 160 Ga. 30; Egyptian Seed Growers Exchange V. Hollinger, 238 Ill. App. 178; Kansas Wheat Growers Ass'n. v. Schulte, 113 Kan. 673; Hart Potato Growers Ass'n. v. Grainer, 236 Mich. 638.

Provisions for liquidated damages as well as other enforcement measures, are available equally in respect to agency as to purchase and sale contracts. Notwithstanding the contract clause and the statutes, the reasonable relationship requirement has apparently not been abrogated and the presumption in favor of the contract clauses can be overcome by showing that the liquidated damages are absurdly out of proportion to any likely injury to the association. (Sun-Maid Raisin Growers v. Oklahoma Cotton Growers Ass'n., 126 Okla. 265. It is believed, therefore, that legislation enabling industry groups to similarly resort to this type of remedy, in the manner suggested in the relevant provisions in the standard act governing cooperatives, while at least providing a statutory basis for any action taken in accordance therewith, might fall short of the goal sought to be attained; it would still leave open to attack the method of adjusting the sum stipulated to be paid to a reasonable estimate of the extent of the injury which a breach of the agreement might cause.

VIII LEGISLATIVE REGULATION OF REMEDIES

The foregoing leads one to the conclusion that if the employment of such a remedy in connection with voluntary industry agreements is available at all, its legal justification can only be found in a specific description of the same in the legislation under which such agreements are to be consummated.

If the power otherwise exists to regulate the subject matter, that Congress has the right to regulate private contractual rights by remedial legislation penal or compensatory in character, is indicated in the enactment of many such statutes and the decisions of our courts.

Chicago, B & Q Ry. Co. v. Cram, 228 U.S. 70, 57 L. Ed. 754, involved the validity of a statute of the State of Nebraska fixing the minimum speed for the transportation of live stock and which provided that a carrier "violating any provisions of the Act shall pay to the owner of such live stock the sum of $10. for each hour for each car it extends or prolongs the time of transportation beyond the period here limited as liquidated damages, to be recovered in an ordinary action, as other debts are recovered." The Supreme Court of Nebraska held (84 Neb. 607, 122 N.W. 31) that the statute imposed only compensatory damages, fixing them at a sum certain because of the difficulty of the ascertainment of the actual damages suffered. This view upheld in the U.S. Supreme Court, Mr. Justice McKenna stating: "Two propositions only are involved: (1) the power of the legislature to impose a limitation of the time for the transportation of live stock: (2) to provide adequate measure of damages which may be difficult to estimate or prove. It is too late in the day to deny the possession of the first power, and we think the other is fully established, and that the statute was enacted to meet conditions which had arisen from the conduct of the carriers and which in the judgment of the legislature, demanded a remedy."

The provision in an Act of Utah providing a limitation in the daily working of certain miners and that any person, etc., who shall violate the same shall be deemed guilty of a misdemeanor was sustained as a valid exercise of the policy power of the State, and not violative of the provisions of the Fourteenth Amendment of the Constitution of the United States in Holden v. Hardy, 169 U.S. 36.

The infringement of copyright under the copyright laws of the United States is protected in the statute, (Sec. 25, Title 17, U.S.C.A.) by a provision that infringers shall pay "such damages as the copyright proprietor may have suffered * * * as well as the profits which the infringers shall have made from such infringement * * * or in lieu of actual damages and profits, such damages as to the court shall appear to be just; and in assessing such damages the court may, in its discretion, allow the amounts fixed by the statute, etc." The statute then specifies certain limits of assessment in respect of copyrighted matters and concludes: "and such damages shall in no case exceed the sum of $5,000, nor be less than $250. and shall not be regarded as a penalty." The court in S.E. Hendricks Co. v. Thomas Pub. Co., 242 F. Rep. 37, related that the language of this section was a growth of years, resulting from the efforts of Congress to avoid the strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some

pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits. See, also, Brady v. Daly, 173 U.S. 148, 44 L. Ed. 109.

Regulations relating to merchant seamen contained in Chapter 18 of Title 46, U.S.C.A. also exemplify control by Congress of private contractual relations. Thus, Section 594, "Any seaman who has signed an agreement and is afterward discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, a sum equal in amount to one month's wages as compensation, and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, recover such compensation as if it were wages duly earned." In Calvin v. Huntly, 178 Mass. 29, 59 N.E. 435, it was held that the statute was not penal but remedial, the court stating, "It is to be observed that the language of the section is not that ordinarily used in a penal statute. Neither the word 'penalty' nor 'forfeiture' is in it. Moreover, it does not provide punishment for the class of criminal offense, nor for the neglect of a statutory duty, nor even for the neglect of a duty in the performance of which the public, as such, may be supposed to have an interest. It speaks not of punishment, but of compensation. Its object is to protect the seamen from loss, rather than to punish the master for discharging him. The remedy is given to the seaman alone, and its plain purpose is to furnish a clear and well-defined rule of damages, as between him and the master, for a breach of contract in which the seaman and the master or owner are the only persons interested." See also Sections 596, 597, 642, and 670 of the same Statute.

Section 86 of Chapter 2, Title 12, (Banks and Banking) U.S.C.A., after prohibiting the charging of a rate of interest greater than is allowed by the preceding section provides, "In case the greater rate of interest has been made, the person by whom it has been paid, or his legal representatives, may recover back, in nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same. * * *" The enactment of this section was upheld as a valid exercise of the power of Congress, in Schlesinger v. Gilhooly, 81 N.E. 619, 189 N.Y. 1.

Then there are the Workmen's Compensation Acts and the line of decisions supporting the same. "That it was consistent for the legislature to prescribe a rule for computing compensation to be paid injured employees is not open to question." -- Morison-Merrill and Co. v. Industrial Commission, 186 P. (2d) 295.

The courts have invariably held that the optional statutes do not infringe the due process and equal protection provisions of the Constitution. (See L.R.A. 1916A, 414) In Smith v. Cudahy Packing Co.,115 Kan. 874,875; 225 P. 110, the Supreme Court of Kansas said "The further contention is made, however, that under the interpretation given itthe statute violates the clause of the Fourteenth Amendment to the Federal Constitution relating to due process of law, and that relating to the equal protection of the law, by allowing a greater sum for an injury to the thumb and finger than would be allowed for their entire loss. The measures of compensation prescribed by the Act are necessarily approximations, and if inequalities arise from

the application of the general rules there laid down we do not think a violation of the Constitution results. We perceive no discrimination against the defendant. The provisions challenged may sometimes work to its benefit and sometimes to its disadvantage. However that may be, the defendant has the option of subjecting itself to the operation of the Compensation Act or of being exempt therefrom. Having voluntarily elected to be governed by the statute, it is not in a situation to invoke the inequality resulting from its provisions as a ground for declaring it unconstitutional. We do not discover that the precise point here involved or one closely akin to it has been passed upon, but questions as to whether various features of a workmen's compensation act were violative of the Fourteenth Amendment have frequently been disposed of by reference to the fact that its application was made optional." And in Brenner v. Heruben, 170 Wis. 565, 176 N.W. 228 (later confirmed in Mueller & Son Co. v. Gothard, 173 Wis. 135, 179 N.W. 576) where, by amendment to the Workmen's Compensation Act it was provided that compensation be trebled if an injured employee be a minor of permit age and at the time of injury is allowed to work without a written permit pursuant to statute (Child Labor Law), the argument against its constitutionality was that treble compensation was a penalty, and its exaction was in effect the enforcement of a penal or criminal statute, viz., that of the child labor law which was not in any way germane to the subject of compensation for industrial accidents. The court stated, however, "But the question is, not whether it is a justifiable common-law scheme, but whether it is fairly germane to, and within the limits of the general scheme of, the Workmen's Compensation Act. If it is, then it is constitutional, for an employer in coming under the act waived his common-law remedies and agreed to be bound by the remedies afforded by the Act and of lawful amendments thereto. Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 170 N.W. 276, 171 N.W. 935." See also, Slick v. Hamaker, 28 F. (2d) 103.

Nor is a compensation act invalid for the reason that it creates a new remedy. De May v. Liberty Foundry Co., 37 S.W. (2d) 640. "The state has complete control over the remedies which it offers to suitors even to the point of making them applicable to rights or equities already in existence. It may change the common law and the statutes so as to create duties and liabilities which never existed before." -- Ives v. So. Buffalo Ry. Co., 94 N.E. 431, 201 N.Y. 271, 298.

"If it (Legislature) may change defensive common-law rules, may it not also change a common-law rule of liability? The power of the Legislature cannot exist in the one instance and not in the other. In virtue of its authority to enact laws, and in doing so, to supersede common-law rules where it deems such action wise, it exists in both; and it was in our opinion therefore competent for the Legislature by this Act (Texas Workmen's Compensation Act), * * * to provide, according to its plan, a fixed compensation to be paid the employee * * *." Middleton v. Texas Power & Light Co., 185 S.W. 556, 561, (aff'd 249 U.S. 152).

Crowell v. Benson, 285 U.S. 22 involved the validity of the Longshoremen's and Harbor Worker's Compensation Act (Act of March 4, 1927). Mr. Chief Justice Hughes stated at page 41, "In view of Federal power to alter and revise the maritime law, there appears to be no room for objection on constitutional grounds to the creation of these rights (referring to classifying disabilities, fixing the range of compensation, etc) unless it can be found

in the due process clause of the Fifth Amendment. But it cannot be said that either the classification of the statute or the extent of the compensation provided are unreasonable. In view of the difficulties which inhere in the ascertainment of actual damages, the Congress was entitled to provide for the payment of amounts which would reasonably approximate the probable damages. See Chicago B. & Q. Ry. Co. v. Cram, 228 U. S. 70, 84; compare Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340, 348."

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THE IMPOSITION OF CONDITIONS UPON THE LETTING OF GOVERNMENT CONTRACTS

CONCLUSIONS

1) The imposition of conditions in the letting of Government contracts under Executive Orders 6246 and 6646 was an effective means of enforcing the provisions of the N.R.A. codes in certain industries.

2) The effectiveness of the Government Contracts Division was somewhat hampered by the lack of cooperation of other Government Departments.

3) The imposition of conditions in the letting of Government contracts is sound in principle although, as a primary means of establishing wage and hour standards, it would be effective only in a limited field.

4) The imposition of conditions in the letting of Government contracts will be a valuable aid in enforcing any legislation designed to maintain wage and hour standards or any general plan to that end.

5) The Walsh Government Contracts Bill (S 3055) as passed by the Senate is generally satisfactory, but is susceptible to amendment contained in the report.

6) Under the authorities there is no doubt as to the right of the Government to prescribe the conditions upon which it will permit public work to be done on its behalf.

THE IMPOSITION OF CONDITIONS UPON THE LETTING OF GOVERNMENT CONTRACTS.

I. N.R.A. EXPERIENCE

Executive Order No. 6248, dated August 10, 1933, provided that contracts, entered into by the United States, or any of its agencies, for supplies mined, produced or manufactured in the United States, should require the contractor to comply with the appropriate code, or if there was no such code then with the President's Reemployment agreement. Cancellation and open market purchases at the risk of the contractor and the surety were provided as penalties for non-compliance.

Executive Order No. 6646, dated March 14, 1934, broadened the scope of the previous order, to require that all bids be accompanied by a certificate of compliance and to include all contracts and purchase orders of Federal agencies or those of states, municipalities, counties, persons and corporations in connection with projects involving a loan or grant of Federal funds. Fine and imprisonment (similar to Sec. 10(a) of N.I.R.A.) were provided for false certification in addition to cancellation and completion of the contract at the expense of the guilty party.

A Government Contracts Division of N.R.A. was organized to administer these Executive Orders and to handle cases arising thereunder. The division is now engaged in the preparation of (a) a case study of approximately 8,000 cases handled by the division, (b) a detailed history of the division and its activities, and (c) a report for the House Judiciary Committee which is considering the Walsh Government Contracts Bill (S 3055). These studies which are occupying the entire time of a large staff will to a large extent cover the outline of my work as set forth in Work Outline No. 26. It was impossible for one man working alone to cover adequately the entire field and therefore, effort has been made to avoid duplicating the work of others.

At the outset it must be realized that the Executive Orders referred to constituted an ancillary and supplementary method of enforcing compliance with N.I.R.A. The effectiveness of such methods, (whether under Executive Orders or statutes) as a secondary means of enforcement would not necessarily enable the accurate prediction of their effectiveness as a primary means of establishing wage and hour standards. Under such Orders persons doing business with the Government were merely required to comply with existing law. But in the absence of a law similar to N.I.R.A legislation the Walsh Government Contracts Bill would require those doing business with the Government to establish labor standards not otherwise required of them and not required of their competitors who do not bid for Government business. This distinction is most important and must be kept in mind in any consideration of N.R.A. experience with Government Contracts.

What is now the Government Contracts Division was originally constituted as the "Government Contracts and Competition Branch of the Compliance Division" in March 1934 by a Compliance Division memorandum. Office Memorandum No. 341, dated March 1, 1935, created the "Government Contracts Division of N.R.A." and set forth its powers and duties. At no time did the Division or its predecessor have the power to cancel contracts. It could hear and determine complaints but as far as cancellation was concerned it could only make recommendations

to the various Government Departments. The case study above referred to will show that the other Departments did not always follow the recommendation to cancel. An illustration of this situation is given.

The case of Morrison Brothers is typical of such instances. They were the low bidders and were awarded a contract to remodel school buildings at Bethesda, Md. Before the job was started they were found to be in violation of the Contractor's Code, and the right to use the Blue Eagle was terminated by the Compliance Division. The Government Contracts Division, after investigation, recommended cancellation of the contract, but P.W.A., for reasons that seemed good and sufficient to them, declined to follow the recommendation and permitted the performance of the contract. Without meaning to criticize the action of P.W.A., or to question the soundness of the reasons which prompted such action, it is submitted that the work of the Government Contracts Division was seriously hampered and its prestige and effectiveness considerably damaged thereby.

Despite its lack of power of cancellation of contracts and the lack of complete cooperation of Governmental Departments, there can be little doubt as to the value of the work of the Division in securing code compliance in many industries. In the case against the Baltimore Lumber Company (L-1407) it appeared that orders for government work constituted 70% of the defendant's business, and because of this fact the defendant was willing to consent to an injunction in order to retain his eligibility status. In the building trades and among building and roads contractors conditions in Government contracts were very valuable in securing code compliance, and the tremendous purchases, under such contracts, of steel, cement, lumber, machine shops products, cotton garments and paper undoubtedly greatly aided enforcement by other means.

In several cases, the details of which will be fully set forth in the History of the Division, the legal propriety and applicability of the Executive Orders was questioned, but in no case was the decision of the court adverse to the Government. Because the subject is included in the History, and because the Orders are no longer in force, a discussion of the cases is unnecessary here, but the legality of the underlying principles will be discussed later.

II. ECONOMIC STUDY

All of the foregoing treats of the subject as a secondary means of enforcing N.R.A. codes. If another similar statute is passed what has been said will apply, and the History and Case study of the Government Contracts Section will be of great value. But if no such legislation is passed there will be an entirely different situation and the past experience of N.R.A. will be of less value. The effectiveness of legislation similar to the Walsh Government Contracts Bill will depend upon the economic pressure that can be exerted by the Government as a customer and creditor, and the value of the Government as a customer would depend entirely upon the amount of Government purchases in a given industry. The Report for the House Judiciary Committee above referred to covers the economic aspects of the Bill, but the independent research herein set forth may prove helpful.

Press Release No. 1420 of the P.W.A. and the charts thereto attached show quite conclusively the very great importance of the Government as a customer of the building trades and allied industries. It appears that at one period nearly 90% of the total construction work was on Government jobs. The building of dams, roads, public buildings, bridges, schools, hospitals and other P.W.A. projects has required the purchase of huge quantities of mill work, builders' supplies, builders' hardware, sheet metal work, lumber, stone, brick, pipe, cement, steel and other building material, and as long as P.W.A. and W.P.A. continue the type of work that requires a large percentage of material such purchases will continue. "Trend of Employment", issued by the Bureau of Labor Statistics (April 1935) on pages 40-41, tabulates the materials purchased by P.W.A. up to March 15, 1935, and shows the total purchases to be $769,268,678.00. There is no doubt of the influence the Government could exert to maintain wage and hour standards in many of the industries mentioned, but, even so, the small builders and contractors, and the small manufacturers who do not bid on Government contracts, would not be affected in the slightest degree by conditions imposed in the letting of such contracts.

A complete tabulation of all purchases of all government departments and agencies would disclose the full extent of the Government's purchasing power, but no such tabulation has been made. These figures are being compiled for the Congressional Committee and will be available in the near future. Cotton and woolen garments for the Army, Navy, Marines, CCC and other organizations are purchased in large quantities, but, even so, the Government makes such purchases for only a small percentage of the total population. In the retail trades and in the service trades which were so troublesome under N.R.A., and in many small industries employing in the aggregate thousands of workers, the influence of the Government as a customer would be negligible or entirely absent. From these observations it is clear that the imposition of conditions in the letting of Government contracts as a primary means of enforcing wage and hour standards would be highly effective in some industries, would have but slight effect in some but would have no effect whatever in many others. An accurate determination of the extent to which individual industries would be affected can be made only after statistics of individual industries are available.

III. WALSH GOVERNMENT CONTRACTS BILL

S-3055, generally known as the Walsh Government Contracts Bill, was introduced in the Senate on June 14, 1935, and was referred to the Committee on Education and Labor. It was rewritten in committee and reported out on August 1st. The Committee report included the following:

"The object of the bill is to prescribe labor conditions to be incorporated in all contracts for construction, articles, materials, supplies, equipment, or services, including contracts for loans or grants made by the United States.

"The purpose of the bill is to establish and maintain reasonable wages on purchases, loans, or grants where Federal funds are involved, directly or indirectly, thereby sustaining the purchasing power of employees.

"The bill is applicable only to those individuals or concerns who receive the benefit of contracts, loans, or grants made directly or indirectly by the Federal Government. The requirements as to wage, hour, and other conditions apply only to those employees whose labor is involved in the performance of the principal contract and such subcontracts thereunder.

"It will end the present paradoxical and unfair situation in which the Government, on the one hand, urges employers to maintain and uphold fair wage standards and, on the other hand, gives vast orders for supplies and construction to the lowest bidder, often a contractor or manufacturer who does not sympathize with and fights hardest against labor and social welfare policies."

* * * * * * * * * * * * * * *

"The bill has been prepared upon the theory that Congress has power to prescribe conditions in public contracts, loans, or grants, and adopt such policies as conditions in them and to direct or authorize the President with respect to their effectuation. Decisions of the Supreme Court bear out this policy. The committee believes that in the absence of action by Congress, the Executive has power to require any condition in contracts, loans, or grants necessary to protect the United States but that his authority stops there and that matters of general policy not strictly necessary to secure to the United States the performance of a contract can only be laid down by Congress.

"Coincident with this theory, the committee has deemed it desirable to include in sections 1, 1-A, 2, 2-A, and 2-B, provisions requiring contractors, subcontractors, and suppliers of articles, materials, supplies, equipment or services upon Government contracts or contracts involving the expenditure of Federal funds in whole or in part, to furnish representations

or agreements that employees engaged in the performance of the contracts or in the production or furnishing of materials or services in connection therewith, have been and will be paid not less than the minimum rates of pay and employed not to exceed the maximum hours as specified in those approved N.R.A. codes of fair competition in effect on May 26, 1935, which are applicable to their respective trades or industries."

* * * * * * * * * * * * *

"Existing statutes require that Government contracts be let to the lowest responsible bidder on open competitive bidding. The operation of this statute was qualified as to wages and hours under the provisions of Executive Order No. 6646 of March 14, 1934. Subsequent to the issuance of this Executive Order, borrowers, grantees, contractors, and subcontractors, on Government contracts were required to comply with the codes of fair competition to which they were subject and in the absence of such codes, with the President's Re-employment Agreement. This procedure was found in actual experience, to be practical and workable and not productive of undue hardship upon industry. However, following the Supreme Court decision in the Schechter case, the operation of Executive Order No. 6646 was necessarily suspended.

"Since the suspension of Executive Order No. 6646, the above statute has been construed as requiring an acceptance of the low bid without any limitations as to wage and hours except those contained in other Federal statutes such as the Adamson Act and Bacon-Davis Act.

"Such construction commits the Government to the unconscionable practice of allowing private industry to dictate wages and hours of labor - no matter how oppresive -- for undertakings financed with Federal funds. The insistence of such standards on projects financed wholly or in part with Federal funds, should, in due course, encourage private industry voluntarily to adopt like standards in private undertakings, thereby increasing purchasing power and improving the general conditions of our citizens.

"The committee believes that the enactment of this bill will aid materially in securing industrial recovery and the permanent adoption of the standards of wages and hours and conditions of labor set forth in the bill."

* * * * * * * *

As originally introduced the Bill was quite restricted but as redrafted by the Committee was exceedingly broad, and, if it could be enforced without any exemptions or exceptions, every one who did business with the Government, directly or indirectly, would be required to certify maintenance of code wages and hours after the effective date of the Act. The Bill is lengthy, and the following abstract is included for purposes of convenience:

"Section 1 provides that in connection with all Government purchases or contracts there shall be included in the proposal or

contract a representation that all persons employed by the contractor in any work connected with or relating to the Government purchases have, since the effective date of the Act, been not paid less than minimum rates of pay and employed not more than such maximum hours as on May 26, 1935, were specified in the appropriate Code of Fair Competition, or in the absence of such Code, in the President's re-employment agreement, and further that such wage and hour provisions will be adhered to in carrying out the contract and that after the effective date of the Bill no persons under sixteen years of age and no convict labor have been employed or will be employed in carrying out the contract.

"Section 1a provides the same conditions with reference to sub-contractors or suppliers of material to the principal contractor.

"Section 2 provides the same conditions with reference to industrial borrowers or grantees.

"Section 2a provides the same conditions for States or political sub-divisions thereof receiving Federal loans or grants.

"Section 2b provides the same conditions for sub-contractors under Section 2 and 2a.

"Section 3 provides for liquidated damages and cancellation.

"Section 4 provides for suits by the United States and the disposition of the funds.

"Section 5 provides for hearings with reference to breach of contract, the summonsing of witnesses and the conclusiveness of the findings.

"Section 6 provides:

(a) That President may make exceptions in specific cases or otherwise whenever such action is recommended by a Governmental agency or when justice or public interest will be served.

(b) Upon the joint recommendation of the Governmental Agency and the contractor, the President may modify the terms of an existing contract respecting pay and hours of labor. "As may be found necessary and proper in the public interest or to prevent injustice or undue hardship."

(c) The President may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances and exemptions to and from any provisions of the Act on the extent of the application to contractors and others.

"Section 7 permits the rejection of bids by those who have previously breached contracts.

"Section 8 sets up wage and hour standards for the guidance of the President.

"Section 9 relates to existing contracts.

"Section 10 relates to Government agencies bidding in competition with private enterprises.

"Section 11 authorizes the organization to administer the Act and provides the funds.

"Section 12 preserves the principles of the Buy-American and Bacon-Davis Acts.

"Section 13, separability clause."

It will be observed that the language of the Act requires the maintenance of wage and hour standards only in the production of the goods purchased by the Government and does not seek to affect wage and hour standards in the manufacture of other merchandise. From a practical point of view, however, it would be difficult if not impossible for an industry to segregate the manufacture of goods for a Government contract, and hence the practical effect of the Act is broader than the language would indicate. It is this wide scope of the Act that makes provision for exemptions absolutely essential, because it may well be that in many industries there will be no members whatever who can qualify under the Act. The proponents of the Bill were apparently well aware of this condition and for this reason gave the President exceedingly broad powers to grant exemptions and exceptions. In the debate on the floor of the Senate, Senator Hastings, of Delaware, objected very forcibly to the granting of such broad powers to the President.

The Bill also seeks to use the lending as well as the spending power of the Government to maintain wage and hour standards, and private persons and corporations, as well as states, municipalities and other political subdivisions who receive Government loans or grants for projects, are required to comply with the Act as to such projects. A study of the use of the Government's lending power is not included in my assignment, but since the spending and lending power are both included in the Walsh Bill, the lending power will be considered briefly. In the lending of money for construction purposes the operation of the Act should be just as effective as in construction projects by the Government. But in the case of loans to industry the effectiveness of the Act would be diminished by competitive conditions. If a borrower from the Government were compelled to pay in its manufacturing process a higher wage than its more fortunate competitors who did not have to borrow from the Government it is difficult to see how the borrower could successfully compete and repay the loan. Under such circumstances exemptions and exceptions would undoubtedly be very numerous.

If legislation of this type is to be advanced at the coming session of Congress consideration should be given to redrafting the Walsh Bill to simplify and clarify its provisions and to extend its scope to exclude all child and convict labor. The Bill as drafted permits bidders on Government contracts to use child labor except on Government work. It is submitted that the Government should refuse to do business with any concern that employs

child or convict labor at any time or under any circumstances. And, since exceptions and exemptions will play such an important part in the administration of the Act, definite standards for the granting of exceptions and exemptions should be incorporated in the Act instead of the exceedingly broad powers contained in Section 6 as now drafted. The advisability of tying the Bill so closely to the old N.R.A. codes should also be considered, for, while the wage and hour provisions in many codes were quite satisfactory, many of them are very complicated and some contain differentials which would prove most troublesome. Serious consideration should be given to the extension of the principles of the Bacon-Davis Act to include projects which are financed in whole or in part by Federal funds and to include hours of labor as well as wages. The principles of the "Buy American Act" could be extended to confine purchases to American manufacturers who pay prevailing wages through the simple expedient of authorizing the rejection of bids of those manufacturers who do not maintain wage and hour standards. Consideration should be given to the establishment of a separate Board for the administration of the Act as contemplated by the Walsh Bill instead of having the Act administered by the Department of Labor as provided by the Bacon-Davis Act.

IV. LEGALITY

Under the authorities there is no doubt as to the right of the Government to prescribe the conditions upon which it will permit public work to be done on its behalf. Memorandum No. 636, of the N.R.A. Legal Research Division, covers certain phases of the question, and the very able memorandum prepared by Mr. Frank Healy, of the N.R.A. Government Contracts Division, covers the subject very fully except perhaps in connection with the question of liquidated damages, which subject is being given exhaustive consideration by Mr. Mortimer Weinbach.

The weight of authority holds that an unsuccessful bidder on a Government contract has no standing in court to question the letting of the contract. These decisions are referred to in the memorandum above mentioned, and appear to be based on the theory that no vested or contractual rights are involved. The cancellation of contracts, however, does involve such rights, and contracts should be cancelled only after notice and an opportunity to the contractor fully to present his side of the case. The procedure set forth in the Walsh Government Contracts Bill is generally satisfactory but consideration should be given to amending it to protect the contractor's rights to a full and fair hearing.

THE IMPOSITION OF CONDITIONS UPON THE LETTING OF GOVERNMENT CONTRACTS

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EXHIBIT

A. Executive Order No. 6246, August 10, 1933, on Administration of the National Industrial Recovery Act. (Not here reproduced).

B. Executive Order No. 6646, March 14, 1934, on Government Contracts and Contracts Involving the Use of Government Funds. (Not here reproduced).

C. Office Memorandum, No. 341 (3165), March 1, 1935, on Government Contracts Division. (Not here reproduced).

D. P. W. A. Release No. 35432, June 9, 1935. Division of Economics and Statistics Report to Public Works Administrator, Harold L. Ickes. (Not here reproduced).

E. Tabulation from "Trend of Employment," on Value of Material Orders Placed for Public Works Projects, by Type of Material.

F. S. 3055 - Walsh Government Contracts Bill. (Not here reproduced).

G. Committee Report on S. 3055. (Not here reproduced).

H. Bacon-Davis Act - Approved, March 3, 1931.

J. Excerpts from "Buy American Act."

K. Excerpts from "Memorandum of Law in Regard to S. 3055.

L. N. R. A. Legal Research Memorandum, March 12, 1935 - "New Legislation - Government Purchases," by Raymond J. Heilman.

EXHIBIT E

Value of Material Orders Placed for Public Works Projects, by Type of Material

[Subject to revision]

Type of material	Value of material orders placed— From beginning of program to Mar. 15, 1935	Value of material orders placed— During month ending Apr. 15, 1935
All materials	$769,263,678	$31,645,166
Aircraft (new)	5,755,768	
Airplane parts	5,080,571	
Aluminum manufactures	232,390	12,327
Ammunition and related products	772,270	30,097
Asbestos products, not elsewhere classified	65,567	460
Awnings, tents, canvas, etc	183,786	21,184
Belting, miscellaneous	28,982	1,651
Boats, steel and wooden (small)	1,281,973	5,262
Bolts, nuts, washers, etc	2,383,359	89,365
Brick, hollow tile, and other clay products	9,644,135	789,850
Carpets and rugs	44,786	325
Carriages and wagons	28,893	145
Cast-iron pipe and fittings	14,514,552	1,112,613
Cement	101,884,305	3,353,892
Chemicals	236,232	21,855
Coal	1,248,336	52,154
Compressed and liquefied gases	236,517	6,683
Concrete products	14,643,325	827,581
Copper products	517,655	24,528
Cordage and twine	225,368	7,697
Cork products, not elsewhere classified	76,933	3,623
Cotton goods	79,661	6,627
Creosote	511,215	27,152
Crushed stone	28,037,613	1,166,079
Doors, shutters, and window sash and frames, molding and trim (metal)	3,628,172	291,493
Electric wiring and fixtures	3,961,402	503,685
Electrical machinery, apparatus, and supplies	38,626,299	1,084,048
Elevators and parts	506,800	185,219
Engines, turbines, tractors, and water wheels	8,419,803	717,535
Explosives	3,137,748	162,125
Fe[illegible] goods	168,554	327
Firearms	772,981	
Forgings, iron, and steel	3,824,925	165,435
Foundry and machine-shop products, not elsewhere classified	80,667,185	2,964,758
Furniture, including store and office fixtures	1,725,397	146,339
Glass	663,068	60,345
Ha[illegible]dw[illegible], miscellaneous	3,750,416	274,125
He[illegible]ng and ventilating equipment	6,888,155	622,169
Instruments, professional and scientific	1,656,988	27,077
Jute goods	54,340	3,484
Lead products	169,723	18,614
Lime	169,904	1,836
Linoleum	56,114	14,369
Locomotives, other than steam	11,813,333	
Locomotives, steam	6,837,004	
Lumber and timber products, not elsewhere classified	36,584,919	1,439,959
Machine tools	4,789,569	221,813
Marble, granite, slate, and other stone products	12,520,195	457,545
Mattresses and bed springs	25,805	248
Meters (gas, water, etc.) and gas generators	268,284	24,499
Minerals and earths, ground or otherwise treated	102,823	146
Models and patterns	14,094	688
Motorcycles and parts	274,395	
Motor vehicles, passenger	483,588	3,657
Motor vehicles, trucks	8,573,200	15,021
Nails and spikes	751,248	69,992
Nonferrous-metal alloys and products, not elsewhere classified	1,139,056	62,205
Paints and varnishes	1,720,709	86,082
Paper products	45,903	1,576
Paving materials and mixtures, not elsewhere classified	11,969,447	386,924
Petroleum products	22,693,459	1,062,180
Photographic apparatus and materials	158,646	470
Planing-mill products	4,386,377	191,393
Plumbing supplies, not elsewhere classified	7,472,616	393,760
Pumps and pumping equipment	8,686,181	481,052
Radio apparatus and supplies	658,878	8,848
Rail fastenings, excluding spikes	5,202,501	399,488
Rails, steel	18,013,011	770,831
Railway cars, freight	35,392,551	2,373
Railway cars, mail and express	429,443	
Railway cars, passenger	7,527,435	
Refrigerators, and refrigerating and ice-making machinery	603,736	8,496
Roofing materials, not elsewhere classified	$2,286,376	$159,804
Rubber goods	356,431	14,347
Sacks and bags	20,593	519
Sand and gravel	48,133,886	1,886,834
Sheet-metal work	2,237,063	70,286
Springs, steel	587,917	695
Steam and other packing, pipe and boiler covering, and gaskets	669,316	42,441
Steel-works and rolling-mill products, other than steel rails, including structural and ornamental metal work	111,276,583	6,558,977
Stoves and ranges, other than electric	204,505	394
Switches, railway	549,910	25,789
Theatrical scenery and stage equipment	36,897	2,308
Tiling, floor and wall, and terrazzo	1,606,718	156,600
Tools, other than machine tools	3,993,738	116,753
Upholstering materials, not elsewhere classified	116,710	732
Wall plaster, wall board, insulating board, and floor composition	1,946,743	163,147
Waste	24,610	66
Window and door screens and weatherstrip	82,224	2,443
Window shades and fixtures	77,983	6,906
Wire products, not elsewhere classified	4,333,049	230,553
Wrought pipe	694,249	116,676
Zinc products	27,103	25,910
Other materials	34,345,222	1,169,607

EXHIBIT H

BACON-DAVIS ACT

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every contract in excess of $5,000 in amount, to which the United States or the District of Columbia is a party, which requires or involves the employment of laborers or mechanics in the construction, alteration, and/or repair of any public buildings of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, shall contain a provision to the effect that the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State in which the public buildings are located, or in the District of Columbia if the public buildings are located there, and a further provision that in case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which can not be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract: PROVIDED, That in case of national emergency the President is authorized to suspend the provisions of this Act.

SEC. 2. This Act shall take effect thirty days after its passage but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding at the time of the passage of this Act."

Approved, March 3, 1931.

EXHIBIT J

BUY AMERICAN ACT

"SEC. 2. Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

SEC. 3 (a) Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States except as provided in section 2: PROVIDED, HOWEVER, That if the head of the department or independent establishment making the contract shall find that in respect to some particular articles, materials, or supplies it is impracticable to make such requirement or that it would unreasonably increase the cost, an exception shall be noted in the specifications as to that particular article, material, or supply, and a public record made of the findings which justified the exception."

EXHIBIT K

EXCERPTS FROM

MEMORANDUM OF LAW IN REGARD TO S. 3055

I. Power of Congress to Require Covenants and Impose Penalties In Contracts

The United States Supreme Court, in considering the act of August 1, 1892 (27 Stat. 340), used the following language:

> The provision in the act of August 1, 1892 (27 Stat. 340), limiting the hours of laborers and mechanics employed by the United States for any contractor or subcontractor upon any of the public works of the United States to eight hours per day except in cases of extraordinary emergency, and imposing penalties for the violation thereof, are constitutional and within the powers of Congress. In this respect Congress has the same power as a State has over the construction of its public works (Atkin v. Kansas, 191 U.S. 207; Ellis v. United States, 206 U.S. 246).

The case of Atkin v. The State of Kansas (191 U.S. 207) cited above is one of the leading cases decided by the United States Supreme Court on the question of legislative acts relating to public contracts. This case involved the validity under the Constitution of the United States of the statute known as the "Eight-hour law of Kansas of 1891," chapter 114, being pages 3827, 3828, and 3829 of the General Statutes of 1901 of that State. This statute made it a criminal offense for a contractor for public work to permit or require an employee to perform labor upon that work in excess of 8 hours each day. The Supreme Court of the United States in upholding the statute as being constitutional uses the following language:

> It may be that the State, in enacting the statute, intended to give its sanction to the view held by me, that, all things considered, the general welfare of employees, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for 8 continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employee on such work to labor in excess of 8 hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary, it belongs

to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

The above decision closes with a broad statement on the subject as follows:

We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done.

EXHIBIT L

MEMORANDUM ON NEW LEGISLATION -- GOVERNMENT PURCHASES

(By Raymond J. Heilman)

This memorandum concerns the possibility of conflict as between existing statutes and the following proposed statute:

"The President may provide means for promotion and maintenance of agreements and codes by requiring departments and agencies of the United States to purchase only from persons complying with such codes and agreements."

An existing statute of which consideration appears to be necessary is the following one:

U. S. C. A. § 5 Title 41 --/Public Contracts/.

§ 5. Advertisements for proposals for purchases and contracts for supplies or services for departments of Government. Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals. (R. S. § 3709; June 25, 1910, c 431, § 23, 36 Stat. 861.)

This letter of this statute does not appear to stand in the way of the giving of full effect to a proposed statute of the sort set forth above. However, it is necessary to examine the judicial treatment of this statute in order to make sure that the statute has not been interpreted or construed as requiring that the lowest bid or the bid the terms of which are most advantageous to the government, taking the subject-matter of the particular transaction concerned, must be accepted, regardless of any consideration extrinsic of the particular bargain involved.

Recently a federal district court has declared that under the quoted existing statute the proposal of the lowest responsible bidder must be accepted by the government, while holding that a lowest bidder upon a proposal by officials of the Federal Emergency Relief Administration for bids could not by injunction or mandamus prevent award of a contract to another bidder. O'Brien v. Carney, 6 F. Supp. 761 (.D.C. Mass, 1934).

Brewster, District Judge, said (p.762):

" "The next question is whether the lowest unsuccessful bidder has any such rights as will entitle him to prevent the execution of the contract, conceding that it was not awarded in accordance with law. There was no

contractual relation between the complainant and the Administration because his bid had never been accepted. If the complainant can assert any rights to the award which this court can recognize, they, I take it, must spring from some federal statute. I do not find any statute which in express terms confers any such right upon a low bidder whose bid has been rejected. Revised Statutes, Sec. 3709 441 U.S.C., Sec. 5 (41 U.S.C.A. Sec. 5), requires that purchases and contracts for supplies in any department of government shall be made by due advertising for proposals except when the public exigency requires immediate delivery. It must follow as a necessary corollary that this act imposes a duty upon the department to accept the proposal most advantageous to the government; otherwise the statute would be meaningless. It has been so held. Scott v. United States, 44 Ct. Cl. 524. It should be observed, however, that according to the Scott case the duty is to accept the lowest responsible bid. This result is both necessary and legitimate. It would not be to the advantage of the government to compel the acceptance of a low bid proposed by one who was unable to perform. Revised Statutes, Section 3709 (41 USCA, Sec. 5) was enacted for the benefit of the United States and not for the bidder. American Smelting & Refining Co. v. United States, 259 U. S. 75, 42 S. Ct. 420, 66 L. ed. 833; United States v. New York & Porto Rico Steamship Co., 239 U. S. 88, 36 S. Ct. 41, 60 L. ed. 161, Colorado Paving Co. v. Murphy, C. C. A. 78 F. 28, 31, 37 L. ed. R.A. 630.

"This last cited case denies to an unsuccessful bidder, even though submitting the lowest bid, any rights to equitable relief. In the opinion it is stated:

> "'It is not settled by the great weight of authority that the lowest bidder cannot compel the issue of a writ of mandamus to enter into a contract with him . . . and the courts hold that he cannot maintain an action at law for damages for their refusal to enter into the contract. . . . This principle is as fatal to a suit in equity as to an action at law. It goes not to defeat any particular cause of action but to defeat the right to any relief."

The court's conclusion was

"that on the authorities these ministerial acts of the respondents are not subject to judicial review and this court is powerless to afford relief." (p.763.)

While the court remarked that in the statutory phrase "responsible bidder· "the term 'responsible' means something more than pecuniary ability; it includes also judgment, skill, ability, capacity and integrity" (p. 762, quoting from Benson, J. in Williams v. Topeka, 85 Kan. 857, 118 P. 864 (1911) it may be doubted, that the courts would include under "responsibility" compliance with Code provisions although it is conceivable that the courts could and might treat non-compliance as so detracting from the integrity and consequently the responsibility of a bidder as to justify award to a higher bidder who had complied with Code provisions, particularly as the very fact of non-compliance with Code provisions might be the condition which made it possible to underbid the bidder who had carried out the Code provisions applicable to him.

It would seem clear that were the proposed statute enacted the existing statute set forth would be treated as not inconsistent with it. The two would seem mutually reconcilable. In the decision which has been discussed above the Court seems to have held a view of this sort in commenting that

> "...The law creating the Federal Emergency Relief Administration makes no exception to the requirements of law and regulations governing purchase of supplies and services for government developments generally . . . ." (p.763).

Another statute relevant in the present connections is the following one:

U. S. C. A. § 7 (1) /Title 41 - Public Contracts/

> "§ 7. (1) Miscellaneous supplies for executive departments and other Government establishments in Washington; advertisements and contracts for. Except as otherwise provided by law all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other Government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Secretary of the Treasury, upon such days as he may designate."

The same considerations appear applicable to this statute as pertain to the existing statute previously discussed (U. S. C. A. § 5).

Another statute which would have rare applicability at most with respect to Codes is the following one in which the phrase "lowest responsible bidder" is included:

U. S. C. A. § 24 /Title 41 - Public Contract./

> "§ 24. Contracts for transportation of moneys, bullion, coin, and securities. Whenever it is practicable contracts for the transportation of moneys, bullion, coin, notes, bonds, and other securities of the United States, and paper shall be let to the lowest responsible bidder therefor, after notice to all parties having means of transportation. (July 7, 1884, c. 332, § 1,* 23 Stat. 204.)"

Conclusion

The proposed statute should not be and probably would not be held incompatible with existing statutes.

Addendum

Attention is invited to Section 7 of the attached pending "Bill to Establish Uniform Requirements Affecting Government Contracts." (s. 215; H.R. 134).

GOVERNMENT-SANCTIONED "BOYCOTTS" AND OTHER PUBLICITY DEVICES

(Labels, Insignia and Other Forms)

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CONCLUSIONS

1) The right of the Government to devise insignia indicating compliance with P.R.A. and to take measures to prevent the improper use of such insignia is beyond question.

2) The extent to which the Government may apply the economic pressure of boycott to secure voluntary compliance depends upon the ends sought to be obtained and the reasonableness of the means to attain those ends.

3) The right of Congress to require the use of labels as indicating compliance with a statute is not subject to serious doubt, provided Congress had the constitutional power to pass the statute in question and provided the label requirements are reasonable.

4) Any future legislation similar to the N.I.R.A. might well include the enforcement provisions employed by N.R.A. If it is contemplated that under such legislation labels are to be used, provision therefor should be made in the Act.

5) Any statute establishing the voluntary or compulsory use of insignia or labels should make clear provision for the removal of insignia and label privileges under rules, regulations, and procedure in conformity with due process requirements.

6) The economic value of the use of insignia depends entirely upon public sentiment. Any attempt to appraise the value of an insignia system is nothing more than an attempt to anticipate public sentiment. Public opinion changes rapidly, and what may be an accurate estimate today may be totally useless next month.

7) Union labels constitute a valuable property right and in the drafting of any legislation similar to the N. R. A. consideration should be given to the protection of such labels as far as possible.

GOVERNMENT-SANCTIONED "BOYCOTTS" AND PUBLICITY DEVICES

Labels, Insignia, and Other Forms

I. Boycott

The term "boycott" has been subject to many and varied judicial definitions. By some courts the use of the term implies an inherent illegality, while other courts have held boycotts lawful unless accompanied by illegal means. It is important, therefore, at the outset, to define the word as used in the above title and as it is to be used in this discussion. The word "boycott" will be used herein in its broad sense, implying no illegality and including any agreement or combination to withhold business intercourse from certain classes of persons and to induce others to withhold such intercourse.

The use of the Blue Eagle under the National Recovery Administration was frequently referred to as a governmental boycott and is the logical starting point for a discussion of the subject. A history of the Blue Eagle is being written by the N.R.A. Organization Studies Group, and a case study is being conducted by the Compliance Division. This work will not be duplicated except where necessary to a proper understanding of this study.

II. Types of Blue Eagle

In practice three varieties of Blue Eagles came into use. The first was known as the Blue Eagle and signified that the person using the Blue Eagle had signed and was complying with the President's reemployment Agreement. The second was a Consumer's Blue Eagle, which indicated that the person displaying this insignia had expressed a willingness to deal only with those persons authorized to display the Blue Eagle. The third was known as the Code Eagle and signified that the person using it was a member of a codified industry and that he was complying with the provisions of the code. In addition to the above uses of the insignia, certain codes required that labels bearing the N.R.A. insignia be attached to the products of the industry under such codes. A brief resume of the salient facts relative to the origin of the various types above referred to will disclose inherent differences which were frequently overlooked.

III. Blue Eagle and Consumer's Blue Eagle

Section 4 (a) of the National Industrial Recovery Act provides as follows:

> "The President is authorized to enter into agreements with, and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, and will be consistent with the requirements of clause (2) of subsection (a) of section 3 for a code of fair competition."

Pursuant to this provision an agreement known as The President's Reemployment Agreement was formulated. The primary object of this Agreement was to improve employment conditions by providing maximum hours and minimum wages. The Agreement was to remain in force from August 1st to December 31st, 1933,

or to any earlier date of approval of a code of fair competition to which the individual signer might be subject. In Section (10) of the Agreement, the signer agreed:

"To support and patronize establishments which also have signed this agreement and are listed as members of N.R.A."

Bulletin No. 3 of the National Recovery Administration, issued July 20th, 1933, set forth the President's Reemployment Program and the Agreement above mentioned. Paragraphs 6 and 8 of that Bulletin provided as follows:

"6. Employers' badge of cooperation

For the public to do its part, it must know which employers have done their part to put people back to work by making these AGREEMENTS with the President and by codes. Every industry and every employer who has agreed with the President on this plan, or who has had approved a code covering the vital subject of reemployment, will be enrolled as a member of N.R.A. and given a certificate and a Government badge showing the seal of N.R.A. and the words: "Member N.R.A. We do our part." It will be authorized to show this badge on all its equipment, goods, communications, and premises. Lists of all employers authorized to use this badge will be on file at all post offices so that any misrepresentation by unauthorized use of N.R.A. badges can be prevented."

"8. Consumers' badge of cooperation

Every consumer in the United States who wishes to cooperate in the President's reemployment drive and be considered as a member in N.R.A. may at any time after August 1, 1933, go to the authorized establishment in his locality (to be announced later) and sign a statement of cooperation as follows:

'I will cooperate in reemployment by supporting and patronizing employers and workers who are members of N.R.A.'

Any such signer will then be given and may thereafter use the insignia of consumer membership in N.R.A."

It will be noted that while these paragraphs referred to insignia, there is no specific reference to the Blue Eagle. The Bulletin No. 3, however, in its original issue had the Blue Eagle design stamped on it. N.R.A. Circular No. 1, issued July 23rd, 1933, promulgated regulations governing the use of N.R.A. insignia, but contains no specific reference to the Blue Eagle. Bulletin No. 4, however, issued shortly thereafter, refers specifically to the Blue Eagle; and among the instructions under the heading, "How to Earn the Blue Eagle," we find the following: "Deal only with others 'Under the Blue Eagle.'"

Bulletin No. 5 of the National Recovery Administration promulgated regulations on procedure for local N.R.A. compliance boards and provided that employers who willfully persisted in non-compliance with P.R.A. should lose the right to display the Blue Eagle.

The signing of the P.R.A., the compliance therewith, and the use of the Blue Eagle signifying compliance were entirely voluntary. By Executive Order 6336 issued October 14th, 1933, the improper use of N.R.A. insignia was prohibited and made subject to the penalties provided in Section 10 (a) of N.I.R.A.

Administrative Orders X-A1 dated October 17th, 1933, and X-A2 dated November 4th, 1933, established regulations for the use of N.R.A. insignia.

IV. Code Eagle

As codes of fair competition were adopted for various industries, the use of the Blue Eagle was continued, but instead of signifying compliance with P.R.A., it was used to signify compliance with the proper code of fair competition. The practice was continued until the creation of the so-called Code Eagle by Administrative Order X-22 approved April 19th, 1934.

It has been pointed out that compliance with P.R.A. was entirely voluntary. With the adoption of codes, however, compliance therewith was compulsory and non-compliance made subject to fine and imprisonment. In the absence of some code provision, however, the use of the N.R.A. insignia was optional.

V. Labels

Certain codes required the use of N.R.A. labels. For example, Section V of the Code of Fair Competition for the Men's Clothing Industry (No. 15) provided as follows:

> "All garments manufactured or distributed shall bear an N.R.A. label, which shall remain attached to such garments. Such labels shall bear a registration number specially assigned to each manufacturer in the Industry. The privilege of using such labels shall be granted and such labels shall be issued to any manufacturer from time to time engaged in the Clothing Industry upon application therefor to the Code Authority, accompanied by a statement of compliance with the standards of operation prescribed by this Code. The privilege of using such labels and the issuance thereof may be withdrawn and cease or may be suspended in respect of any such manufacturer whose operations, after appropriate hearing by The Men's Clothing Code Authority and review by the Administrator, shall be found to be in substantial violation of such standards. Manufacturers shall be entitled to obtain and use such labels if they comply with the provisions of this Code.
>
> "The Men's Clothing Code Authority may establish appropriate machinery for the issuance of such labels in accordance with the foregoing provisions."

By this provision, the use of N.R.A. labels was made mandatory and Section 2 of Article IX of the Code of Fair Competition for the Retail Trade (No. 60) provided as follows:

> "N.R.A. label.--No retailer shall purchase, sell, or exchange any merchandise manufactured under a Code of Fair Competition which requires such merchandise to bear an N.R.A. label, unless said merchandise bears such label. Any retailer rightfully possessing the insignia of the N.R.A. who has in stock or purchases similar merchandise which has been manufactured before the effective date of the Code of Fair Competition requiring such merchandise to bear an N.R.A. label may attach thereto the N.R.A. insignia."

Under these codes both compliance and the use of labels were obligatory.

VI. Distinctions

The distinction between voluntary and compulsory use of labels is important, and therefore the statement that under P.R.A. and under many codes the use of the insignia was optional, while under other codes the use of the insignia was obligatory is repeated. The importance of this distinction lies in the fact that Congress might authorize the use of insignia, indicating a course of conduct which Congress had no power to compel, while the compulsory use of insignia could only be required in those cases where Congress had power to act.

VII. Voluntary Use of Insignia

The use of insignia to indicate a certain status is too old and well established in the law to be questioned seriously at the present time. The use of badges to indicate membership or to indicate war service, and the use of labels to indicate union origin of manufactured goods are examples of the time-honored use of insignia. The right of the Government to devise insignia indicating compliance with P.R.A. and to take measures to prevent the improper use of such insignia was beyond question. But it must be remembered that in the regulations concerning the Blue Eagle, the Governmentnot only sought to do these things, but also to establish what was tantamount to a boycott against those not "under the Blue Eagle." While the question is not free from doubt, the great weight of authority supports the legality of such a boycott.

In Pennsylvania Railroad Company v. United States Railroad Labor Board et al., 261 U.S. 72 (1923), suit was brought to enjoin publication of a decision of the Railroad Labor Board to the effect that the plaintiff had violated a previous decision of the Board. Before considering the arguments of the plaintiff, the Court described the nature of the Board as follows:

> "The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it."

The plaintiff contended that its right to deal with individual representatives of employees as to rules and working conditions was an inherent right which could not be constitutionally taken from it, so that the decision of the Labor Board compelling the plaintiff to recognize labor unions was invalid. The Court answered this contention as follows:

"But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. The Board is to act as a Board of Arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for cooperation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions, which, in its opinion, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision."

The injunction was therefore denied, the Court concluding that the decisions were within the lawful function of the Board to render, and not being compulsory, violated no legal or equitable right of the complaining company. The case was followed in Pennsylvania Federation v. Pennsylvania Railroad Company, 267 U.S. 203 (1925).

It will be noted that in the above case the Pennsylvania Railroad sought an injunction against publication of the decision, and there is no indication that the Board sought to obtain agreements to boycott those who did not comply with their decisions, as was done in the case of the P.R.A. However, in each case, the weight of public opinion was the only means of enforcement.

The American Federation of Labor became involved in a dispute as to hours of labor with the Buck Stove and Range Company. This resulted in a boycott being declared against the Stove Company and in its name being placed on the American Federation of Labor's "unfair list" and on its "we don't patronize list." In addition to this, other methods, such as speeches and editorials, were used, which tended to coerce third persons into refraining from dealing with the Stove Company. The court, while granting a part of the relief prayed for by the complainant, held:

"No one doubts, I think, the right of the members of the American Federation of Labor to refuse to patronize employers whom it regards as unfair to labor. It may procure and keep a list of such employers, not only for the use of its members, but as notice to their friends that the employers whose names appear therein are regarded as unfair to labor. This list may not only be procured and kept available for the members of the association and its friends, but it may be published in a newspaper or series of papers. To this extent they are within their constitutional rights; at least, where a court of equity cannot intervene." (A.F. of L. v. Buck Stove and Range Co., 33 App. D. C. 83 - App. to U.S. s. Ct. dismissed in 219 U.S. 581 on the ground that as the case had been settled by the parties, the question was a moot one.)

The above quotation appears to be supported by the great weight of authority in this country, and since it is not illegal for members of the American Federation of Labor to establish a boycott, it is difficult to see

how it could be held that the members of trades and industries subject to N.R.A. could not do likewise.

Many boycotts have been held unlawful under the anti-trust laws because of their restraint upon interstate commerce. Legal memoranda X-141 and X-245 of the N.R.A. Legal Research Division contain citations of many such cases. They had no application, however, to any question arising under the National Industrial Recovery Act because of Section 5 of Title I of the Act, which reads as follows:

> "While this title is in effect (or in the case of a license, while section 4 (b) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States.

Public Resolution No. 26, extending the National Industrial Recovery Act to April 1st, 1936, restricted the operation of this provision. In any future consideration of a system similar to the P.R.A. or the use of insignia thereunder, careful provision should be made to suspend the operation of the anti-trust laws so far as such system is concerned.

In Holcombe v. Cramer, 231 Massachusetts 99, 120 N.E. 354 (1918), the Massachusetts Court had before it a statute establishing a Minimum Wage Commission for the State of Massachusetts. The statute authorized the Commission to fix minimum wages for women. The wages fixed were not compulsory and could be disregarded by employers. However, the Commission was directed to publish the names of those employers who failed to abide by the minimum wages established. Suit was brought by members of the Minimum Wage Commission against the defendant to force the latter to give evidence as to the wages paid by him. Defendant contended that the statute was unconstitutional. The Court held the statute constitutional on the ground that it contained no compulsory features, but stated:

> "There are limits to the right of the public to inquire into private affairs. The coercion resulting from legislation, in form not compulsory, may in practice be so severe as to leave no alternative save compliance. In such a case its validity would depend not upon its form but its substance. But it is not necessary to discuss limitations of this character, for the reason that the present statute does not according to its terms reach into that realm. There is nothing in the record to warrant the inference that such is its actual effect."

The extent to which the Government may apply the economic pressure of boycott to secure voluntary compliance depends upon the ends sought to be obtained and the reasonableness of the means to attain those ends. Means that may be entirely legal under one set of circumstances may be illegal under another, as being tantamount to compulsion. Each case must rest on its own facts, and no attempt will be made here to do more than indicate the general principles involved, it being impossible to conceive and discuss all the various phases that might possibly arise.

VIII. Compulsory Use of Insignia

The use of insignia can only be required by the Congress in matters falling within its constitutional powers. The use of various kinds of stamps as indicating the payment of taxes is well established. The right of Congress to require the use of labels as indicating compliance with a statute is not subject to serious doubt, provided Congress had the constitutional power to pass the statute in question and the label requirements are reasonable. All that has been said with reference to the Government's powers with reference to the use of voluntary insignia applies with equal force to the use of compulsory insignia, and since those not using the insignia would be law breakers, the Government might reasonably use means to make a boycott effective that would be improper under a voluntary system.

Under the N.I.R.A., violation thereof, or of any code promulgated thereunder, was punishable by fine. The District Courts were also given jurisdiction to prevent and restrain violations of codes of fair competition; and, in addition to these remedies, the Federal Trade Commission was empowered to take appropriate action. The Act nowhere provided for the use of labels as a means of obtaining compliance; but, under the broad provisions of the Act, such provisions were properly incorporated in codes of fair competition.

Any future legislation similar to the N.I.R.A. might well include the enforcement provisions employed by N.R.A. If it is contemplated that under such legislation labels are to be used, provision therefor should be made in the Act.

IX. Procedure

The issuance of labels from time to time under codes requiring labels was in effect a license frequently renewed. Failure to comply with the Act terminated the right to purchase labels; and since labels were necessary to do business lawfully, it really terminated the right to do business. While the privilege of using labels and N.R.A. insignia was in some respects a mere license, in some industries it was tantamount to a franchise and as such constituted a property right within the Fourteenth Amendment of the Federal Constitution. (Frost v. Corporation Commission, 278 U.S. 515 (1929)). It has been held that the restraint imposed upon legislation by the due process clauses contained in the Fifth and Fourteenth Amendments of the Constitution is the same. (Heiner v. Donnan, 285 U.S. 312 (1932)). It would thus seem that the right to use labels could be terminated only in accord with due process requirements. Too many N.R.A. memoranda have been written concerning the requirements of due process to warrant any discussion of the subject here, except to state that any statute establishing such a system should make clear provision for the removal of label privileges under rules, regulations, and procedure in conformity with due process requirements.

X. Economic Value

The economic value of the use of insignia depended entirely upon public sentiment. The rush of many millions to secure Blue Eagles and Consumer's Eagles indicated overwhelming public support, and the economic pressure

throughout the entire country was at that time very substantial. The history of the Blue Eagle above referred to will give the facts and figures indicating the extent of the public support.

Any attempt to appraise the value of an insignia system is nothing more than an attempt to anticipate public sentiment. Public opinion changes rapidly, and what may be an accurate estimate today may be totally useless next month. It should be noted, however, that a label system that would be very popular in one part of the country would be very unpopular in another. Likewise, a label system that would be very effective and popular in one industry would be totally ineffective and very unpopular in another. In attempting to draft any legislation establishing a system of labels and insignia, due consideration should be given to these and other factors.

XI. Some Problems

Insignia may be used to indicate the status of a particular individual insofar as compliance is concerned. For various reasons it would seem preferable for the insignia to stand for compliance, rather than non-compliance. From the administrative aspect it is easier to permit individuals to publicize their compliance and to deprive them of such privilege on proof of non-compliance than to alter the status quo and to stigmatize with the "scarlet letter" after the offense has been discovered. While both involve a certain amount of deception until non-compliance is discovered, the former prompts initial action on the individual's part and hence permit the imposition of conditions at the outset. Moreover, the individual is anxious affirmatively to indicate his compliance by a significant insignia. Finally, it would seem that both the consuming public and the regulated individual would be more receptive to a system that affirmatively publicizes the good merchant than to one that affirmatively singles out the "bad man." Since the effectiveness of the use of such insignia is based upon the joint cooperation of the public and the group regulated, it is vital that consideration be given their psychological preferences as far as they may be determined.

A serious problem would arise if the insignia did not have universal application. In all probability, whatever regulatory law is adopted, it will not apply to every individual engaged in trade or industry. Moreover, it is probable that the groups subject to it will not be defined in terms that the public can apply with certainty, since the extent to which an individual is engaged in or affects interstate commerce will be an important factor. As a result, there will be a large number of individuals who will be outside the scope of the law, but whose freedom from regulation will not be apparent to the general public. If this group is not permitted to display the insignia of compliance, this inability of the public to distinguish the members of this group from those individuals who have been deprived of the insignia for non-compliance will obviously result in loss to the former. This could be remedied by either permitting such individuals to display insignia upon voluntary compliance with certain standards or by permitting them to indicate in some standardized way that they are exempt from regulation. Both methods are difficult to apply. The first necessitates the difficult administrative task of establishing and supervising standards for these individuals. The second necessitates a preliminary classification of the entire industrial life of the nation. Because of the legal problems involved and because of the precedents that will be established by such classification, the task would be both burdensome and hazardous to those administering the law.

The use of informative insignia can only be effective if the insignia and what it stands for are widely publicized. The consuming public will be urged in one form or another to patronize those concerns that display the insignia, since such display indicates that the individual is complying with the law and hence conducting his business on the basis of fair and decent standards. Since only the Government may withdraw the right to display such insignia, the Government is thus placed in the position of guaranteeing to the public that each individual displaying the insignia is complying with law and is entitled to display the insignia. It does not seem possible for the Government to live up to that guarantee--the administrative task is too great. Moreover, even when violation is detected, there would be an interval of time between detection and removal of the privilege to display the insignia, during which the Government would be practically powerless to inform the public that the tacit guarantee could not be relied upon. The use of insignia indicating non-compliance does not alter this difficulty.

Labels have been used in this country more than half a century to indicate goods manufactured in accordance with certain standards. Such labels were first used to indicate that cigars were made by white and not by coolie labor. Union labels have been used for many years to indicate goods made in accordance with union standards. In many instances, the standards indicated by the union label were higher than those required under codes and indicated by the Blue Eagle. The Union Label Trades Department of the American Federation of Labor protested that the use of the Blue Eagle was interfering with the use of union labels. No action was taken, however, and the organization then published a pamphlet reading in part as follows:

> "There are some who think that the Blue Eagle is a substitute for the Union Label. This false idea is fostered by certain anti-union employers who see in it a distinct advantage, because the Union Label represents standards of employment superior to those required by the National Recovery Administration.
>
> "The Blue Eagle does not signify that products are made under trade union conditions. Daily, newspapers direct our attention to the business establishments which are entitled to use the Blue Eagle, but which completely ignore proper representation and collective bargaining agreements by denying their workers the right to organize..
>
> ". . .Therefore, when it comes to Union Labels and the Blue Eagles, look for both of them, if you choose, but demand the Union Label. There is no substitute!"

It is difficult to see how this problem can be satisfactorily met. It does not seem likely that in the immediate future the Government will attempt to compel the payment of union wages. Even if the Government did make such an attempt, the unions would no doubt raise their standards, so that in all probability there will be continually a hiatus between any standards that may be established by the Government and the standards established by trade unions. Union labels constitute a valuable property right, and in the drafting of any legislation similar to the N.R.A., consideration should be given to the protection of such labels as far as possible. In order to do this, it might be well to have different insignia for union and non-union manufactured goods.